TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1931~~ 1932

No. ~~307~~ 19

THE UNITED STATES OF AMERICA, APPELLANT

vs.

SHREVEPORT GRAIN & ELEVATOR COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA

FILED MARCH 18, 1932

(36,621)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 807

THE UNITED STATES OF AMERICA, APPELLANT

vs.

SHREVEPORT GRAIN & ELEVATOR COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA

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1 In United States District Court for the Western District of Louisiana, Shreveport Division

October term, A. D. 1931, at Shreveport

No. 6214

UNITED STATES OF AMERICA

vs.

SHREVEPORT GRAIN & ELEVATOR COMPANY

Indictment

Filed Nov. 4, 1931

The grand jurors of the United States, within and for the Western District of Louisiana, Shreveport Division, impaneled, sworn, and charged in said court, at the term aforesaid, to inquire for the United States within and for the Western District of Louisiana, Shreveport Division, upon their oaths, charge and present:

That the Shreveport Grain and Elevator Company, a corporation organized and existing under and by virtue of the laws of the State of Louisiana and a citizen and resident of the city of Shreveport, in the district aforesaid, did in the district aforesaid, on the fourth day of April, in the year of our Lord, one thousand nine hundred and twenty-nine, then and there, in violation of the act of Congress of June 30, 1906, known as the food and drugs act (34 Statutes at Large, 768), unlawfully ship and deliver for shipment in interstate commerce, from the city of Shreveport, in the State of Louisiana, in the United States, via the Kansas City Southern Railway Company, a corporation, a common carrier, to the city of Natchez, in the State of Mississippi, in the United States, consigned to Stein & Hicks Company, a certain article of food, contained in a number of sacks, each sack then and there denominated as to the contents thereof and labeled, marked, and branded as follows, to wit:

2

RED HEAD

FRESH
GROUND

MEAL

SHREVEPORT GRAIN & ELE. CO.
SHREVEPORT, LA.

FRESH GROUND NET

96 MEAL LBS.

That said article of food contained in said sacks, when shipped as aforesaid, was then and there misbranded within the meaning of

said act of Congress in that the statement, to wit, "96 lbs. net," borne on the sacks containing the article regarding the article, was false and misleading in this, that it represented that each of said sacks contained ninety-six pounds net of the article, whereas in truth and in fact, each of said sacks did not contain ninety-six pounds net of the article but did contain a less amount, to wit, not more than ninety-four pounds twelve ounces net of the article; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT II

And the said grand jurors of the United States, within and for the Western District of Louisiana, Shreveport Division, impaneled, sworn, and charged in said court, at the term aforesaid, to inquire for the United States within and for the Western District of Louisiana, Shreveport Division, upon their oaths, further charge and present:

That the Shreveport Grain and Elevator Company, a corporation organized and existing under and by virtue of the laws of the State of Louisiana and a citizen and resident of the city of Shreveport, in the district aforesaid, did in the district aforesaid, on the fourth day of April, in the year of our Lord, one thousand nine hundred and twenty-nine, then and there in violation of the act of Congress of June 30, 1906, known as the food and drugs act (34 Statutes at Large, 7680, unlawfully ship and deliver for shipment,
3 in interstate commerce, from the city of Shreveport, in the State of Louisiana, in the United States, via the Kansas City Southern Railway Company, a corporation, a common carrier, to the city of Natchez, in the State of Mississippi, in the United States, consigned to Stein & Hicks Company, a certain article of food, contained in a number of sacks, each sack then and there denominated as to the contents thereof and labeled, marked, and branded as more fully described in the first count of this indictment, and which said description in said first count is, by reference, hereby incorporated in this count.

That said article of food, contained in said sacks, when shipped as aforesaid, was then and there misbranded within the meaning of said act of Congress, in that it was labeled "96 lbs. net" so as to deceive and mislead the purchaser into the belief that each of said sacks contained ninety-six pounds net of the article, whereas, in truth and in fact, each of said sacks did not contain ninety-six pounds net of the article, but did contain a less amount, to wit, not more than ninety-four pounds twelve ounces net of the article; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT III

And the said grand jurors of the United States, within and for the Western District of Louisiana, Shreveport Division, impaneled, sworn, and charged in said court, at the term aforesaid, to inquire for the United States within and for the Western District of Louisiana, Shreveport Division, upon their oaths, further charge and present:

That the Shreveport Grain and Elevator Company, a corporation organized and existing under and by virtue of the laws of the State of Louisiana, and a citizen and resident of the city of Shreveport, in the district aforesaid, did in the district aforesaid, on the fourth day of April, in the year of our Lord, one thousand nine hundred and twenty-nine, then and there, in violation of the act of Congress of June 30, 1906, known as the food and drugs act (34 Statutes at Large, 768), as amended by the act of March 3,
4 1913 (37 Statutes at Large, 732), unlawfully ship and deliver for shipment, in interstate commerce, from the city of Shreveport, in the State of Louisiana, in the United States, via the Kansas City Southern Railway Company, a corporation, a common carrier, to the city of Natchez, in the State of Mississippi, in the United States, consigned to Stein & Hicks Company, a certain article of food, contained in a number of sacks, each sack then and there denominated as to the contents thereof and labeled, marked, and branded as more fully described in the first count of this indictment, and which said description in said first count is, by reference, hereby incorporated in this count.

That said article of food contained in said sacks, when shipped as aforesaid, was then and there misbranded within the meaning of said act of Congress, as amended, in that it was food in package form and the quantity of the contents was not plainly and conspicuously marked on the outside of the package; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT IV

And the said grand jurors of the United States, within and for the Western District of Louisiana, Shreveport Division, impaneled, sworn, and charged in said court, at the term aforesaid, to inquire for the United States within and for the Western District of Louisiana, Shreveport Division, upon their oaths, further charge and present:

That the Shreveport Grain and Elevator Company, a corporation organized and existing under and by virtue of the laws of the State of Louisiana, and a citizen and resident of the city of Shreveport, in the district aforesaid, did in the district aforesaid, on the fifth day of April, in the year of our Lord, one thousand

nine hundred and twenty-nine, then and there, in violation of the act of Congress of June 30, 1906, known as the food and drugs act (34 Statutes at Large, 768), unlawfully ship and deliver for shipment, in interstate commerce, from the city of Shreveport, in the
5 State of Louisiana, in the United States, via the Yazoo & Mississippi Valley Railroad Company, a corporation a common carrier, to the city of Vicksburg, in the State of Mississippi, in the United States, consigned to P. P. Williams & Company, a certain article of food, contained in a number of sacks, each sack then and there denominated as to the contents thereof and labeled, marked, and branded as follows, to wit:

RED HEAD

FRESH
GROUND

MEAL

SHREVEPORT GRAIN & ELE. CO.
SHREVEPORT, LA.

FRESH GROUND NET

24 MEAL LBS.

That said article of food contained in said sacks, when shipped as aforesaid, was then and there misbranded within the meaning of said act of Congress in that the statement, to wit, "24 lbs. net," borne on the sacks containing the article regarding the article, was false and misleading in this, that it represented that each of said sacks contained twenty-four pounds net of the article, whereas, in truth and in fact, each of said sacks did not contain twenty-four pounds net of the article but did contain a less amount, to wit, not more than twenty-three pounds net of the article; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT V

And the said grand jurors of the United States, within and for the Western District of Louisiana, Shreveport Division, impaneled, sworn, and charged in said court, at the term aforesaid, to inquire for the United States within and for the Western District of Louisiana, Shreveport Division, upon their oaths, further charge and present:

6 That the Shreveport Grain and Elevator Company, a corporation organized and existing under and by virtue of the laws of the State of Louisiana and a citizen and resident of the city of Shreveport, in the district aforesaid, did in the district aforesaid, on the fifth day of April, in the year of our Lord, one thousand

nine hundred and twenty-nine, then and there, in violation of the act of Congress of June 30, 1906, known as the food and drugs act (34 Statutes at Large, 768), unlawfully ship and deliver for shipment, in interstate commerce, from the city of Shreveport, in the State of Louisiana, in the United States, via the Yazoo & Mississippi Valley Railroad Company, a corporation, a common carrier, to the city of Vicksburg, in the State of Mississippi, in the United States, consigned to P. P. Williams & Company, a certain article of food, contained in a number of sacks, each sack then and there denominated as to the contents thereof and labeled, marked, and branded as more fully described in the fourth count of this indictment, and which said description in said fourth count is, by reference, hereby incorporated in this count.

That said article of food contained in said sacks, when shipped as aforesaid, was then and there misbranded within the meaning of said act of Congress in that it was labeled "24 lbs. net," so as to deceive and mislead the purchaser into the belief that each of said sacks contained twenty-four pounds net of the article, whereas, in truth and in fact, each of said sacks did not contain twenty-four pounds net of the article but did contain a less amount, to wit, not more than twenty-three pounds net of the article; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count VI

And the said grand jurors of the United States within and for the Western District of Louisiana, Shreveport Division, impaneled, sworn, and charged in said court, at the term aforesaid, to inquire for the United States within and for the Western
7 District of Louisiana, Shreveport division, upon their oaths, further charge and present:

That the Shreveport Grain and Elevator Company, a corporation organized and existing under and by virtue of the laws of the State of Louisiana and a citizen and resident of the city of Shreveport, in the district aforesaid, did in the district aforesaid, on the fifth day of April, in the year of our Lord, one thousand nine hundred and twenty-nine, then and there, in violation of the act of Congress of June 30, 1906, known as the food and drugs act (34 Statutes at Large, 768), as amended by the act of March 3, 1913 (37 Statutes at Large, 732), unlawfully ship and deliver for shipment, in interstate commerce, from the city of Shreveport, in the State of Louisiana, in the United States, via the Yazoo & Mississippi Valley Railroad Company, a corporation, a common carrier, to the city of Vicksburg, in the State of Mississippi, in the United States, consigned to P. P. Williams & Company a certain article of food, contained in a number of sacks, each sack then and there denominated as to the contents thereof and labeled, marked, and branded

as more fully described in the fourth count of this indictment, and which said description in said fourth count is, by reference, hereby incorporated in this count.

That said article of food contained in said sacks, when shipped as aforesad, was then and there misbranded within the meaning of said act of Congress as amended in that it was food in package form and the quantity of the contents was not plainly and conspicuously marked on the outside of the package; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

8 COUNT VII

And the said grand jurors of the United States, within and for the Western District of Louisiana, Shreveport Division, impaneled, sworn, and charged in said court, at the term aforesaid, to inquire for the United States within and for the Western District of Louisiana, Shreveport Division, upon their oaths, further charge and present:

That the Shreveport Grain and Elevator Company, a corporation organized and existing under and by virtue of the laws of the State of Louisiana, and a citizen and resident of the city of Shreveport, in the district aforesaid, did in the district aforesaid; on the third and fifth days of April, in the year of our Lord one thousand nine hundred and twenty-nine, then and there, in violation of the act of Congress of June 30, 1906, known as the food and drugs act (34 Statutes at Large, 768), unlawfully ship and deliver for shipment, in interstate commerce, from the city of Shreveport, in the State of Louisiana, in the United States, via the Yazoo & Mississippi Valley Railroad Company, a corporation, a common carrier, to the city of Vicksburg, in the State of Mississippi, in the United States, consigned to P. P. Williams & Company, a certain article of food, contained in a number of sacks, each sack then and there denominated as to the contents thereof and labeled, marked, and branded as follows, to wit:

RED HEAD

FRESH
GROUND
MEAL

SHREVEPORT GRAIN & ELE. CO.
SHREVEPORT, LA.

FRESH GROUND NET
98 MEAL LBS.

That said article of food contained in said sacks, when shipped as aforesaid, was then and there misbranded within the meaning of

said act of Congress, in that the statement, to wit, "98 lbs. net," borne on the sacks containing the article regarding the article, was false and misleading in this, that it represented that each of
9 said sacks contained ninety-eight pounds net of the article, whereas, in truth and in fact, each of said sacks did not contain ninety-eight pounds net of the article, but did contain a less amount, to wit, not more than ninety-seven pounds net of the article; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT VIII

And the grand jurors of the United States, within and for the Western District of Louisiana, Shreveport Division, impaneled, sworn, and charged in said court, at the term aforesaid, to inquire for the United States within and for the Western District of Louisiana, Shreveport Division, upon their oaths, further charge and present: That the Shreveport Grain and Elevator Company, a corporation organized and existing under and by virtue of the laws of the State of Louisiana and a citizen and resident of the city of Shreveport, in the district aforesaid, did in the district aforesaid, on the third and fifth days of April, in the year of our Lord one thousand nine hundred and twenty-nine, then and there, in violation of the act of Congress of June 30, 1906, known as the food and drugs act (34 Statutes at Large, 768), unlawfully ship and deliver for shipment, in interstate commerce, from the city of Shreveport, in the State of Louisiana, in the United States, via the Yazoo & Mississippi Valley Railroad Company, a common carrier, to the city of Vicksburg, in the State of Mississippi, in the United States, consigned to P. P. Williams & Company, a certain article of food, contained in a number of sacks, each sack then and there denominated as to the contents thereof and labeled, marked, and branded as more fully described in the seventh count of this indictment, and which said description in said seventh count is, by reference, hereby incorporated in this count.

That said article of food contained in said sacks, when
10 shipped as aforesaid, was then and there misbranded within the meaning of said act of Congress in that it was labeled "98 lbs. net," so as to deceive and mislead the purchaser into the belief that each of said sacks contained ninety-eight pounds net of the article, whereas, in truth and in fact, each of said sacks did not contain ninety-eight pounds net of the article but did contain a less amount, to wit, not more than ninety-seven pounds net of the article; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT IX

And the said grand jurors of the United States, within and for the Western District of Louisiana, Shreveport Division, impaneled,

sworn, and charged in said court, at the term aforesaid, to inquire for the United States within and for the Western District of Louisiana, Shreveport Division, upon their oaths, further charge and present:

That the Shreveport Grain and Elevator Company, a corporation organized and existing under and by virtue of the laws of the State of Louisiana and a citizen and resident of the city of Shreveport, in the district aforesaid, did in the district aforesaid, on the third and fifth days of April, in the year of our Lord one thousand nine hundred and twenty-nine, then and there, in violation of the act of Congress of June 30, 1906, known as the food and drugs act (34 Statutes at Large, 768), as amended by the act of March 3, 1913 (37 Statutes at Large, 732), unlawfully ship and deliver for shipment, in interstate commerce, from the city of Shreveport, in the State of Louisiana, in the United States, via the Yazoo & Mississippi Valley Railroad Company, a corporation, a common carrier, to the city of Vicksburg, in the State of Mississippi, in the United States, consigned to P. P. Williams & Company, a certain article of food, contained in a number of sacks, each sack then and there denominated as to the contents thereof and labeled, marked, and branded as more fully described in the seventh count of this indict-
11 ment, and which said description in said seventh count is, by reference, hereby incorporated in this count.

That said article of food contained in said sacks, when shipped as aforesaid, was then and there misbranded within the meaning of said act of Congress as amended in that it was food in package form and the quantity of the contents was not plainly and conspicuously marked on the outside of the package; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

PHILIP H. MECOM,
United States Attorney.
J. FAIR HARDIN,
Asst. U. S. Attorney.

A true bill:
FRED WILSON,
Foreman.
(File endorsement omitted.)

Marshal's return

Filed Nov. 7, 1931

Received this writ in Shreveport, La., Nov. 6, 1931, and executed on the Shreveport Grain & Elevator Co. on that date by delivering certified copy of this writ to J. H. Blalock, vice president of Shreveport Grain & Elevator Co., in person, in the office maintained by said

company, in Shreveport, La., he being highest officer of said company present in office at time of service.

GEORGE W. MONTGOMERY,
U. S. Marshal.
By A. COLLINS, *Deputy.*

(File endorsement omitted.)

12 In United States District Court

(Title omitted.)

Demurrer

Filed Nov. 9, 1931

Now comes the defendant and demurs to the information or bill of indictment herein, and for grounds of demurrer assigns the following:

That said information or bill of indictment charges no offense against the laws of the United States.

PUGH, GRIMMET & BOATNER,
FRED SIMON,
Attorneys for Shreveport Grain & Elevator Company,
A Corporation, Defendant.

(File endorsement omitted.)

13 In United States District Court

(Title omitted.)

Motion to quash

Filed Nov. 9, 1931

Now into court, through undersigned counsel, comes Shreveport Grain & Elevator Company, and moves this court that the bill of information or bill of indictment herein be quashed, annulled, and dismissed, for the following reasons, to wit:

1

That the act of Congress of June 30th, 1906, known as the "food and drug act" (34 Statutes at Large, 768), in so far as relied on by the Government herein, is unconstitutional, null, and void, in the following particulars:

That it is violative of articles one, two, and three of the Constitution of the United States, in that it attempts to grant legislative powers to the judiciary.

That it violates amendment five of the Constitution of the United States, in that it seeks to deprive of life, liberty, and property without due process of law.

That it violates amendment six of the Constitution of the United States, in that it is too indefinite, sets up no ascertainable standard of guilty, and defendant cannot be informed of the nature and cause of the accusation against it thereunder.

Wherefore, mover prays that the bill of information or bill of indictment herein, be quashed, annulled, avoided, set aside, and dismissed, and that the defendant be discharged.

PUGH, GRIMMET & BOATNER,
FRED SIMON,
Attorneys for Mover.

(File endorsement omitted.)

14 In United States District Court for the Western District of Louisiana, Shreveport Division

No. 5542, at law—Criminal docket

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

SHREVEPORT GRAIN & ELEVATOR COMPANY, DEFENDANT

Messrs. Philip H. Mecom, U. S. attorney, and J. Fair Hardin, asst. U. S. attorney, Shreveport, Louisiana, for plaintiff.

Messrs. Pugh, Grimmet & Boatner, Shreveport, Louisiana, for defendant.

Opinion of the court on rehearing

Filed September 18, 1930

DAWKINS, J.: This is a criminal information, charging the defendant with misbranding certain corn bran, in violation of the pure food & drugs act of June 30, 1906 (34 Stat. 768), in that each sack of said product was branded as containing "100 lbs. net," whereas in truth they contained a lesser quantity. By amendment it is charged that some of the sacks contained not more than 85 lbs. net, and that the average was about 96 lbs.

Defendant moved to quash the information on the ground that said act violates arts. 1, 2, and 3 of the Federal Constitution because it attempts "to grant legislative powers to the judiciary and to the executive departments of the Government"; and it violates the fifth amendment to the Constitution in that it "seeks to deprive of life, liberty, and property without due process of law," as well as
15 the fourteenth amendment, "for the same reason"; and further, that it violates the sixth amendment because "it is too indefinite, sets up no ascertainable standard of guilt, and defendant

can not be informed of the nature and cause of the accusation against it thereunder." After declaring that sacks or packages containing articles of food shall have the net weight or measure plainly stamped thereon, the third paragraph of Sec. VIII of the act provides as follows:

"Third. If in package form, the quantity and contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: Provided, however, That reasonable violations shall be permitted and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of sec. 3 of this act."

It must be remembered that this is a criminal action for the alleged violation of this statute, one of the very few that have been brought thereunder, and while the proceeding is against a corporation, it might easily have been one charging an individual, who in default of payment of fine could be subjected to imprisonment. Hence a much stricter construction is required than if it were merely an act affecting civil rights. I have no doubt that Congress has the power, for the protection of the public, to require that packages containing articles of food shall have stamped thereon the correct weight or number and that the dealer, without having any fraudulent or criminal purpose may, in an extensive business, be unable to comply exactly in each instance with this requirement. However, in such circumstances it would be a question of intent for the court and jury, if there was a variation, but the dealer would have a fixed standard by which to be guided, whereas,
16 under the quoted provision of the act, its violation, in large measure, is left either to the discretion of the enforcing department in making the rules or regulations, or to the judgment of the court and jury in each instance as to what is reasonable. This might vary according to the views of the particular tribunal, and the dealer could never know whether he was violating the law or not until he was brought into court.

For these reasons, I believe the asserted ground of unconstitutionality under the sixth amendment, is well founded. See U. S. vs. Cohen Grovery Co., 255 U. S. 81; Connally vs. General Construction Company, 269 U. S. 385; Yu Cong Eng vs. Trinidad, 271 U. S. 500; U. S. vs. Reese, et al., 92 U. S. 214; U. S. vs. Brewer, 139 U. S. 278; Todd vs. U. S., 154 U S. 282.

For the reasons assigned the demurrer or motions to dismiss will be sustained Proper decree may be presented.

Done and signed at Monroe, Louisiana, on this the 16th day of September, A. D. 1930.

BEN C. DAWKINS,
U. S. D. J.

(File endorsement omitted.)

17 In United States District Court for the Western District of Louisiana, Shreveport Division

No. 6214—Criminal docket

UNITED STATES OF AMERICA, PLAINTIFF

vs.

SHREVEPORT GRAIN & ELEVATOR COMPANY, DEFENDANT

Messrs. Philip H. Mecom, U. S. attorney, J. Fair Hardin, asst. U. S. atty., Shreveport, Louisiana, for plaintiff.

Mr. Fred Simon, Shreveport, Louisiana, and Messrs. Pugh, Grimmet & Boatner, Shreveport, Louisiana, for defendant.

Court's opinion

Filed Feb. 10, 1932

DAWKINS, J.: For the reasons given in memorandum opinion handed down in a similar prosecution by the Government against this defendant some months ago (U. S. vs. Shreveport Grain & Elevator Company, No. 5542), I think the demurrer and motion to quash should be sustained. Proper decree should be presented.

Done and signed in chambers at Monroe, Louisiana, on this 8th day of February, A. D. 1932.

BEN C. DAWKINS,
U. S. D. J.

(File endorsement omitted.)

18 In United States District Court for the Western District of Louisiana, Shreveport Division

No. 6214. F. & D. No. 23765

UNITED STATES OF AMERICA

vs.

SHREVEPORT GRAIN & ELEVATOR COMPANY, A CORPORATION

Order sustaining motion to quash and dismissing case

Filed Feb. 19, 1932

This cause having duly come on for hearing upon demurrer and motion to quash, and the same having been argued and submitted, and the court being of the opinion that the same are well founded in law, they have been sustained, and accordingly, it is hereby

Ordered, adjudged, and decreed that this proceeding be, and the same is hereby, dismissed with costs.

Judgment rendered on the 10th day of February, 1932.

Judgment read and signed in open court, at Shreveport, Louisiana, on this the 19th day of February, 1932.

BEN C. DAWKINS,
Judge, United States District Court, for the Western District of Louisiana.

(File endorsement omitted.)

19 In United States District Court

(Title omitted.)

Petition for appeal

Filed March 7, 1932

To the honorable BEN C. DAWKINS,
Judge of said court:

Now comes the United States of America in the above numbered and entitled cause, through Philip H. Mecom, United States attorney, and J. Fair Hardin, assistant United States attorney, and feeling themselves aggrieved by the opinion of this court, dated February 8, 1932, and filed and entered February 10, 1932, and by the final decree of this court rendered on February 10, 1932, and read and signed on February 19, 1932, in said cause in favor of the defendant, Shreveport Grain and Elevator Company, a corporation, sustaining the demurrer and motion to quash filed herein on the ground that paragraph 3 of section 8 of the pure food & drugs act of June 30, 1906, as amended under which the indictment herein is laid, is unconstitutional as violative of the sixth amendment to the Constitution of the United States, and ordering and decreeing the dismissal of this cause, petition this honorable court for an order of appeal direct to the Supreme Court of the United States, sitting at Washington, D. C., pursuant to section 682, title 18, United States Code, and file in connection herewith their bill of exception, assignment of errors.

Wherefore, petitioners pray that the order of appeal be granted, returnable according to law, and that the defendant, or its counsel, be duly cited and served with notice thereof, and pray for all orders and decrees necessary and for full, general relief.

PHILIP H. MECOM,
United States Attorney.
J. FAIR HARDIN,
Assistant United States Attorney.

20 In United States District Court

(Title omitted.)

Plaintiff's bill of exception and assignment of errors

Filed March 7, 1932

Comes now the plaintiff in the above numbered and styled cause and excepts to the opinion and decree of the court herein, and assigns the following errors, which it avers were committed by the court and upon which it relies on the prosecution of the appeal applied for herein:

1

The court erred in holding in the memorandum opinion filed herein, and in the memorandum opinion referred to and made part of this opinion in United States vs. Shreveport Grain & Elevator Company, No. 4442 (45 Fed. 2d 354), that paragraph 3rd of section 8 of the pure food and drugs act of June 30, 1906, as amended (37 Stat. 732, 21 U. S. C. A., sec. 10, paragraph 3rd), under which this indictment is laid and reading as follows:

"Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count. Reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section 3 of this title."

in violative of the sixth amendment of the Constitution of the United States in the following language:

"For these reasons, I believe the asserted ground of unconstitutionality under the sixth amendment, is well founded."

2

That the court erred in sustaining the demurrer and motion to quash filed by the defendant herein, upon the ground of the unconstitutionality of said act as set out in said demurrer and motion.

21 Wherefore, plaintiff prays that this, its assignment of errors and bill of exception to the ruling and judgment of the court, be approved and allowed and that the judgment of the District Court be reversed herein.

PHILIP H. MECOM,
United States Attorney.
J. FAIR HARDIN,
Assistant United States Attorney.

Approved:
BEN C. DAWKINS,
District Judge.

(File endorsement omitted.)

22 In United States District Court

Order allowing appeal

Filed March 7, 1932

Considering the above and foregoing petition for appeal, together with assignment of errors, it is therefore ordered that petitioner, the United States of America, be and it is hereby granted an appeal to the Supreme Court of the United States sitting at Washington, D. C., returnable according to law.

It is further ordered that notice of this appeal be given and served upon the defendant or its counsel of record.

Thus done, ordered, and signed, at Opelousas, Louisiana, on this the 7 day of March, 1932.

BEN C. DAWKINS,
District Judge.

(File endorsement omitted.)

In United States District Court

Waiver of notice of appeal and citation

Filed March 9, 1932

Counsel for defendant and appellee take notice of the appeal granted herein, and of the order dated March 7, 1932, and acknowledge receipt of a copy of the petition, order, and assignment of errors attached thereto, and waive citation of appeal and the service of process for the defendant and appellee.

Witness our hands at Shreveport, La., this March 9, 1932.

YANDELL BOATNER,
JUDSON M. GRIMMET,
Counsel for Defendant, Appellee.

(File endorsement omitted.)

23 In United States District Court Western District of Louisiana

Minute entries

Shreveport, Louisiana, Thursday, November 5, 1931

(Title omitted.)

ORDER FOR SERVICE

Considering the annexed bill of information filed herein by the United States against the Shreveport Grain & Elevator Company, it is ordered that a certified copy of said bill of information be served

on the said Shreveport Grain & Elevator Company, and that the defendant, Shreveport Grain & Elevator Company, a corporation, be and it is hereby ordered to appear before this court, through its duly authorized officers, at Shreveport, La., at 10 o'clock a. m., on November 9th, 1931, and there plead and make answer to the bill of information heretofore filed against it, and herein fail not under penalty of the law.

Done and signed in open court at Shreveport, Louisiana, on this the 5th day of November, 1931.

BEN C. DAWKINS,
Judge.

Ordered that court adjourn.

Shreveport, Louisiana, Monday, November 9, 1931

(Title omitted.)

Demurrer, and motion to dismiss by defendant filed.

Mr. Harding representing the Government and Mr. Simon representing the defendant both in open court and consenting, and on their joint motion,

It was ordered that said demurrer and motion be fixed for hearing on Friday, November 20, 1931.

Ordered that court adjourn.

24 Shreveport, Louisiana, Tuesday, November 24, 1931

(Title omitted.)

Asst. U. S. attorney, J. Fair Hardin, present and representing the Government, and Fred Simon, Esquire, of counsel for the defendant, also present, and said counsel agreeing and consenting, and on their joint motion,

It was ordered that the demurrer and motion to dismiss filed on behalf of the defendant company herein be submitted on the briefs in the case of the United States versus Shreveport Grain and Elevator Company, No. 5542, and on additional briefs to be filed, if desired, within fifteen days; after which the case is then to be taken under advisement by the court.

Mr. Hardin, on behalf of the Government, presented and filed an additional brief.

Ordered that court adjourn.

Shreveport, Louisiana, Monday, February 15, 1932

(Title omitted.)

Asst. U. S. attorney, J. Fair Hardin, appearing in open court, excepted to the—ruling of the court sustaining the demurrer and

motion to quash filed by the defendant and reserved the right to file a formal bill of exception on behalf of the Government.

Ordered that court adjourn.

25 In United States District Court

Præcipe for transcript of record

Filed March 19, 1932

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY, WESTERN DISTRICT OF LOUISIANA,
Shreveport, Louisiana, March 10, 1932.

JFH–FM

Clerk,
United States District Court Building.

In re United States vs. Shreveport Grain and Elevator Co. No. 6214

DEAR SIR: Please include in the transcript on the above case on appeal to the Supreme Court the following documents:

1. Indictment.
2. Defendant's demurrer and motion to quash.
3. The opinion of the court in case of United States vs. Shreveport Grain & Elevator Co., No. 5542.
4. The opinion of the court in this case (No. 6214).

4½. Order sustaining motion to quash and dismiss case.

5. The petition and order for appeal and plaintiff's bill of exception and assignment of error, and waiver of notice and citation of appeal.
6. This præcipe.
7. Minutes of court.

Yours very truly,

(Signed) J. FAIR HARDIN,
Assistant United States Attorney.

(File endorsement omitted.)

26 (Clerk's certificate to foregoing transcript omitted in printing.)

27 In Supreme Court of the United States

On appeal from the District Court of the United States for the Western District of Louisiana

Statement of points relied upon and designation of entire record for printing

Filed March 22, 1932

Pursuant to rule 13 of this court, appellant specifies the following as the points upon which it intends to rely in the above-entitled cause:

1. The District Court erred in sustaining the demurrer to the indictment.

2. The District Court erred in sustaining the motion to quash the indictment.

3. The District Court erred in holding that the third paragraph of that portion of section 8 of the food and drugs act, as amended, relating to the misbranding of food (U. S. C. title 21, sec. 10), under which the indictment was laid, violates the sixth amendment of the Constitution of the United States.

28 The entire record as filed should be printed.

THOMAS D. THACHER,
Solicitor General.

Dated March 22, 1932.

(File endorsement omitted.)

[Indorsement on cover:] Enter Attorney General. File No. 36,621. W. Louisiana, D. C. U. S. Term No. 807. The United States of America, appellant, vs. Shreveport Grain & Elevator Company. Filed March 18, 1932. File No. 36,621.

U. S. GOVERNMENT PRINTING OFFICE

FILE COPY

MAR 2

No. [redacted] 19

In the Supreme Court of the United States

OCTOBER TERM, 1931

UNITED STATES OF AMERICA, APPELLANT

v.

SHREVEPORT GRAIN & ELEVATOR COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA

STATEMENT OF JURISDICTION

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 807

UNITED STATES OF AMERICA, APPELLANT

v.

SHREVEPORT GRAIN & ELEVATOR COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA

STATEMENT OF JURISDICTION

In compliance with Rule 12 of this Court appellant submits herewith its statement showing the basis of this Court's jurisdiction in the above entitled cause.

STATUTES

The statutory jurisdiction of this Court to review by direct appeal the judgment here complained of is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C. Title 18, Sec. 682), otherwise known as the Criminal Appeals Act, and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925.

109636—32

B

Dates of judgment and order allowing appeal

The judgment of the District Court was entered February 19, 1932. (R. 18.)[1]

Appeal was allowed March 7, 1932. (R. 22.) The case was docketed in this Court on March 18, 1932.

C

Nature of the case

The United States proceeded against the defendant by way of indictment on the ground that three shipments of meal made by this company were misbranded within the meaning of the Food and Drugs Act, as amended, in that the sacks did not contain the number of pounds stamped thereon. (R. 1–11.) The defendant filed a demurrer to the indictment and also a motion to quash on the ground, among others, that Paragraph Third of that portion of Section 8 of the Food and Drugs Act relating to the misbranding of food violates the Sixth Amendment of the Constitution in that "it is too indefinite, sets no ascertainable standard of guilt, and defendant can not be informed of the nature and the cause of the accusation against it thereunder." (R. 12–13.) The District Court

[1] All reference to the record are to the pages of the certified unprinted record prepared by the Clerk of the District Court and on file with the Clerk of this Court. The record has not yet been printed.

sustained the demurrer and the motion to quash on that ground and filed an opinion relying on its prior opinion in *United States* v. *Shreveport Grain & Elevator Company*, 46 F. (2d) 354 (see R. 14), in which case the Government had proceeded against the same company by way of information in connection with previous shipments. (R. 14–18.)

D

Cases sustaining jurisdiction

United States v. *Stevenson*, 215 U. S. 190, 195–196.

United States v. *Yuginovich*, 256 U. S. 450, 458.

United States v. *Sprague*, 282 U. S. 716.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
ROY ST. LEWIS,
Assistant Attorney General.
W. CLIFTON STONE,
Attorney.

MARCH, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

FILE COPY

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No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, APPELLANT

v.

SHREVEPORT GRAIN & ELEVATOR COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

(REVISED)

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 19

THE UNITED STATES OF AMERICA, APPELLANT

v.

SHREVEPORT GRAIN & ELEVATOR COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 12) has not been reported. A memorandum opinion by the same court in an earlier case against the same defendant based on similar facts and upon which the court relied in the present case (R. 10) is reported in 46 F. (2d) 354.

JURISDICTION

The judgment to be reviewed was entered February 19, 1932. (R. 12.) The appeal was allowed March 7, 1932. (R. 15.) The jurisdiction of this

Court rests on the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 8 of the Food and Drugs Act, as amended, is unconstitutional on the ground that it is so indefinite as not to inform the accused of the nature and cause of the accusation against it.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The constitutional provisions, statutes, and regulations involved are set forth in Appendices A and C, *infra,* pp. 25–32, 37–40.

STATEMENT

The defendant was indicted on November 4, 1931, for a violation of paragraph 3 of Section 8 of the Food and Drugs Act, as amended by the Act of March 3, 1913 (*infra,* p. 30), by marking on the outside of sacks of ground meal, forming three consignments shipped in interstate commerce, a quantity greater than was actually contained in the sacks. (R. 1–8.)

The defendant demurred to the indictment on the ground that it charged no offense against the United States. The defendant also filed a motion to quash on the ground that the provisions of the Act on which the indictment was based were unconstitutional under Articles I, II, and III, and

Amendments V and VI of the Constitution. (R. 9, 10.)

The District Court sustained the motion to quash, stating in its memorandum opinion that the decision was based on "the reasons given in memorandum opinion handed down in a similar prosecution by the Government against this defendant some months ago (U. S. vs. Shreveport Grain & Elevator Company, No. 5542)." (R. 12.) In the earlier opinion the court had held that "the asserted ground of unconstitutionality under the sixth amendment, is well founded." (R. 11.)[1]

The United States thereupon took this appeal.

SPECIFICATION OF ERRORS

The District Court erred—

1. In sustaining the demurrer to the indictment.

2. In sustaining the motion to quash the indictment.

3. In holding that the third paragraph of Section 8 of the Food and Drugs Act, as amended, relating to the misbranding of food (U. S. C., Title 21, Sec. 10), under which the indictment was laid, violates the Sixth Amendment of the Constitution of the United States.

---

[1] The first prosecution was brought by information, and consequently the adverse decision of the District Court in that case was not subject to review by this Court under the Criminal Appeals Act. This proceeding was begun by indictment against the same defendant on similar facts, so that the question could be brought to this Court by appeal.

SUMMARY OF ARGUMENT

This controversy could not have arisen under the statute as originally enacted, which made it a misdemeanor not to state the weight or measure of a package "plainly and correctly," *if* stated at all. The amended provision, now in question, *requires* the contents of a package to be "plainly and conspicuously marked" on the outside; and the question in this case is whether this amendment rendered the statute unconstitutional because it also contained a proviso that "reasonable variations" shall be permitted and that tolerances and small package exemptions shall be established by rules and regulations promulgated by the Secretaries of Agriculture, Commerce, and the Treasury.

The statute in question fully satisfies the requirement of due process under the Fifth Amendment, and is not repugnant to the Sixth Amendment because of any uncertainty in its definition of an offense. Pursuant to its terms a regulation was adopted which has been in force for over eighteen years. This regulation clearly classifies and characterizes the permissible variations from accuracy of statement, and leaves no room for the contention that the nature of the offense is too indefinite and uncertain to afford a defendant the due process guaranteed under the Fifth Amendment, or the information regarding the nature and cause of the accusation required under the Sixth Amendment.

The legislative history of the amended statute shows that it was adopted because of the desirabil-

ity of *requiring* content marking of packages, and that the proviso was included because of the recognized impossibility in practice of absolute accuracy of statement in all cases. The problem was one often dealt with in State statutes, and many States have followed the example of this statute providing for reasonable tolerances. There are now twenty-nine States and one Territory having similar statutes. Numerous decisions of this Court in analogous situations sustain the view that the statute now in question is not unconstitutional.

United States v. *Cohen Grocery Co.*, 255 U. S. 81, upon which the District Court relied, is distinguishable, since the statute in that case fixed no ascertainable standard whatsoever, whereas under the Food and Drugs Act a definite standard, requiring accuracy of statement, is prescribed, and reasonable tolerances are permitted under regulation. Upon compliance with the standards set by the statute all persons may be assured that there is no possible criminal liability. Reasonable variations are also beyond the reach of criminal prosecution. The regulations are reasonable, definite, and certain.

The Sixth Amendment can have no application to this case, because the prosecution of an offense under the Food and Drugs Act is not a "criminal prosecution" within the meaning of that amendment. It is at most a petty offense, to the prosecution of which the guarantees of the Sixth Amendment are inapplicable.

ARGUMENT

I

PRELIMINARY STATEMENT

Section 2 of the Food and Drugs Act (Act of June 30, 1906, c. 3915, 34 Stat. 768; U. S. C., Title 21, Sec. 2; *infra*, pp. 26–27) made it unlawful to ship in interstate commerce any article of food which was "adulterated or misbranded." It provided that any person violating this provision should be guilty of a "misdemeanor" and should be fined "not exceeding two hundred dollars for the first offense."

In Section 8 of the Act (*infra*, pp. 27–30) the term "misbranded," as used in the Act, was defined. One of the circumstances in which it was provided that an article of food should be deemed misbranded within the Act was:

> Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

If this provision had remained unchanged, the present controversy could not have arisen. But the Act of March 3, 1913, c. 117, 37 Stat. 732, amended the Pure Food and Drugs Act of 1906 by striking out the clause which has just been quoted and inserting in its place the following:

> Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical

> count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act.

The amended provision now in question *requires* the contents of a package to be "plainly and conspicuously marked" on the outside. And the question in this case is whether this amendment is unconstitutional because it also contains a proviso that "reasonable variations" shall be permitted and that tolerances and small-package exemptions shall be established by rules and regulations promulgated by the Secretaries of Agriculture, Commerce, and the Treasury.

The legislative history shows that this amendment was urged and adopted because of the desirability of *requiring* that goods sold in package form be marked in terms of weight and because of the impossibility in practice of complying with such a requirement unless some allowances were made. Extracts from the Committee Reports and Hearings on the measure are set forth in Appendix B, *infra,* pp. 33–36.

The provisions of the Federal Food and Drugs Act involved in this case have been incorporated into the food and drugs laws of many States. Some of these provisions allowing "reasonable variations" were enacted before the amendment of the

Federal Act in 1913, but most of them followed the amendment and were modeled after it. A detailed examination of the State legislation discloses that twenty-nine States and Hawaii have laws requiring that articles sold in packages be branded with the weight of the contents, with the further provision that "reasonable variations" shall be allowed.[2] In most of the States this provision is included in the food and drugs laws, but in a few it is a part of closely analogous legislation. References to these State statutes are given in Appendix D (*infra*, pp. 41–43).

There have been very few decisions respecting the constitutionality of provisions such as the one here involved, although the Federal provision has been enforced for nearly twenty years. Five cases have arisen under the Federal statute. In *United States* v. *Merchants Biscuit Co.*, decided Oct. 25, 1924, an unreported case, the District Court for Colorado held the statute constitutional against the arguments adopted by the court below in this case. The statute was also held valid in *United States* v. *Centralia Dairy Co.*, unreported, decided July 18, 1932, by the District Court for the Western District of Washington. In *United States* v. *Shreveport Grain & Elevator Co.*, 46 F. (2d) 354, and in the present case, the court below held the statute unconstitutional. In *United States* v. *American Maid Flour Mill Co.*, unreported (S. D. Tex.), the stat-

[2] Similar legislation is in force in England. See Appendix, D, *infra*, pp. 43–44.

ute was also held unconstitutional, the court stating from the bench that it was following the *Shreveport* decision.

An exhaustive search for cases under the State statutes has disclosed only one. *Ex parte Humphrey,* 92 Tex. Crim. 501, arose under a statute which was different in setting from that here involved, but in substance and wording much the same. (Tex. Acts 1919, c. 130, Sec. 8.) The statute was held unconstitutional; but the decision does not refer to the Federal Constitution and seems to have been based entirely on State grounds.

II

THE STATUTE FULLY SATISFIES THE REQUIREMENT OF DUE PROCESS UNDER THE FIFTH AMENDMENT, AND IS NOT REPUGNANT TO THE SIXTH AMENDMENT BECAUSE OF ANY UNCERTAINTY IN ITS DEFINITION OF AN OFFENSE

The statute involved in this case provides that—

> reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act.

Section 3 of the Food and Drugs Act (*infra,* p. 27) referred to in this provision authorized the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce to make "uniform rules and regulations for carrying out the provisions of this Act."

Shortly after the Act of March 3, 1913, was adopted, a question arose whether the language

quoted above authorized the three Secretaries to promulgate regulations regarding "reasonable variations." Attorney General McReynolds replied to a request for his opinion that the Secretaries had such power. 30 Op. A. G. 222.

Pursuant to the authority given by the statute as construed by the Attorney General, the Secretaries promulgated a regulation with respect to marking the quantity of food in package form. This regulation was contained in Food Inspection Decision 154, which was issued on May 11, 1914, as an amendment to Regulation 29 of the Rules and Regulations for the enforcement of the Food and Drugs Act (*infra*, pp. 37–40). It provided in part as follows:

> (*i*) The following tolerances and variations from the quantity of the contents marked on the package shall be allowed:
>
> (1) Discrepancies due exclusively to errors in weighing, measuring, or counting which occur in packing conducted in compliance with good commercial practice.
>
> (2) Discrepancies due exclusively to differences in the capacity of bottles and similar containers resulting solely from unavoidable difficulties in manufacturing such bottles or containers so as to be of uniform capacity: *Provided,* That no greater tolerance shall be allowed in case of bottles or similar containers which, because of their design, can not be made of approximate uniform capacity than is allowed in case of bottles or similar containers which can be

manufactured so as to be of approximate uniform capacity.

(3) Discrepancies in weight or measure due exclusively to differences in atmospheric conditions in various places, and which unavoidably result from the ordinary and customary exposure of the packages to evaporation or to the absorption of water.

Discrepancies under classes (1) and (2) of this paragraph shall be as often above as below the marked quantity. The reasonableness of discrepancies under class (3) of this paragraph will be determined on the facts in each case.

This regulation has been in force without change for over eighteen years. It now appears as Regulation 26 of the Rules and Regulations under the Food and Drugs Act (ninth edition), promulgated August 29, 1927. It clearly characterizes the permissible variations as those which are uncontrollable and which may vary one way or the other without manipulation on the part of the seller. It expresses the thought that variations that uniformly or in a preponderance of cases favor the seller as against the buyer are *prima facie* evidence of an intent to cheat, or of such carelessness as should come within the ambit of the statute.

The regulation was in force long before the commission of the offenses charged in the indictment in the present case. Under it the prohibition of

the statute is made definite and certain.[3] It clearly classifies and characterizes the permissible variations from accuracy of statement and leaves no room for the contention that the offense is too indefinite and uncertain to afford a defendant the due process guaranteed under the Fifth Amendment or that understanding of the accusations which is required under the Sixth Amendment. It is, of course, well settled that Congress has authority to provide for the issuance of such regulations and to make their violation an offense. *In re Kollock*, 165 U. S. 526; *Buttfield* v. *Stranahan*, 192 U. S. 470; *United States* v. *Grimaud*, 220 U. S. 506; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1.

In framing the Act and in formulating regulations, it obviously was impossible to prescribe a table of weights and measures to cover permissible variations of all commodities subject to the Act. Neither the Fifth nor the Sixth Amendment requires such particularity. This Court has frequently sustained statutes of the present type, construing them in the light of the obvious purpose of the legislative body.

---

[3] There is a close analogy to the rule that a long-continued practical construction of a doubtful or ambiguous statute by the administrative officers charged with its enforcement is entitled to great weight and will not be upset unless clearly wrong. *Logan* v. *Davis*, 233 U. S. 613, 627; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349; *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331; *Brewster* v. *Gage*, 280 U. S. 327, 336.

In *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 109, a statute denouncing contracts "reasonably calculated" to fix and regulate prices of commodities and acts which "tend" to accomplish the prohibited results, was objected to on the ground that it was so indefinite that no one could tell what acts were embraced within its provisions. But this Court held the statute to be constitutional.

In *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, it was contended that the word "kosher" and the phrase "orthodox Hebrew religious requirements" contained in a statute regulating the sale of meat were so indefinite and uncertain as to render the statute unconstitutional. This Court held that the statute required no more than an honest purpose on the part of sellers to distinguish between what is and is not "kosher," and further that the term "kosher" has a meaning well enough defined to enable one engaged in the trade to apply it correctly. In *Miller* v. *Strahl*, 239 U. S. 426, this Court decided that a statute requiring hotel proprietors "to do all in their power" to save guests in case of fire was not invalid for uncertainty. In *Omaechevarria* v. *Idaho*, 246 U. S. 343, the Court held that a statute in which the words "usual" and "range" were used in connection with cattle feeding was sufficient, as "men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it." In *Sproles* v. *Binford*, 286 U. S. 374,

392–393, the Court upheld a Texas statute limiting the net loads of trucks using the highways, despite provisions exempting vehicles used to transport property from point of origin "to the nearest practicable common carrier receiving or loading point" or from a common carrier unloading point "by way of the shortest practicable route to destination." The contention that this language was so uncertain that it did not afford a sufficient standard of conduct was rejected. In *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 18, this Court held that a California statute prohibiting "unreasonable" waste of natural gas was not, in the light of the construction of the state court, "invalid upon its face, merely by reason of uncertainty," so as to deprive the state court of jurisdiction to determine whether there had been unreasonable waste with respect to a particular field. See also *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 366–367, and *Lavine* v. *California,* 236 U. S. 528.

The cases just referred to arose under the Fourteenth Amendment, but they would seem to be equally applicable under the similar language of the Fifth Amendment. *Nash* v. *United States,* 229 U. S. 373, was decided under the Fifth Amendment. There an indictment under the Sherman Act was demurred to on the ground that the statute was so vague as to be inoperative. It was contended that the crime defined contained in its definition an element of degree as to which estimates might differ, with the result that a man might find

himself imprisoned because his honest judgment did not anticipate that of a jury of less competent men. This Court held that there was no constitutional difficulty in the way of enforcing the Act, and said (p. 377):

> But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.

See also *Farmers' Livestock Commission Co.* v. *United States,* 54 F. (2d) 375 (E. D. Ill.), in which a three-judge court held valid the Packers and Stockyards Act (c. 64, 42 Stat. 159), which forbids "unfair, unjust, unreasonable, and discriminatory practices."

Although, as we contend (*infra,* pp. 20–23), the Fifth Amendment is the only constitutional provision involved in this case, there is at least one decision under the Sixth Amendment which supports our view. In *Seven Cases* v. *United States,* 239 U. S. 510, another provision of Section 8 of the Food and Drugs Act was attacked under the Sixth Amendment. The contention was that it did not permit the laying of a definite charge because statements, to fall within its prohibitions, must be "false and fraudulent." This Court held the statute valid.[4]

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[4] The same result was reached as to certain provisions of Section 8 of the Food and Drugs Act in *United States* v. *Sweet Valley Wine Co.*, 208 Fed. 85 (N. D. Ohio).

In holding the statute here in question unconstitutional, the lower court relied upon this Court's decision in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81. That case arose under Section 4 of the Lever Act, making it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" or to conspire "to exact excessive prices for any necessaries." This Court held that the words quoted did not fix an ascertainable standard of guilt, saying (p. 89):

> Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. * * *

Thus the statute held unconstitutional in the *Cohen Grocery* case was quite different from that involved here. There the prohibition was the exaction of unjust, unreasonable, or excessive prices for necessaries. Here the statute requires that the

weight of a product sold in packages be marked on the label, authority being given to named officials to establish reasonable variations and tolerances.

This distinction between the *Cohen Grocery* case and cases such as the present was pointed out by this Court in the *Cohen Grocery* opinion itself. Counsel for the Government in that case relied on cases such as *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86, *supra.* But this Court held them inapplicable (p. 92)—

> because the cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.

Under Section 4 of the Lever Act it was necessary to consider an almost unlimited number of widely varying factors which influenced cost, transportation, distribution, and profit, and to determine the meaning of "necessaries." There was no single factor that could be used as a basis of action or standard of conduct.[5] Under the section involved in this case there is a single definite factor—weight.

[5] The *Cohen* case was recently followed in *Champlin Refining Co.* v. *Commission,* 286 U. S. 210, 243, where the Court held unconstitutional as fixing no ascertainable standard of conduct a penal statute prohibiting waste in the production of crude oil in Oklahoma, "waste" being defined to include "economic waste, underground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands." Compare *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 18, *supra.*

A person subject to the provisions of the statute may always safeguard himself by making sure that his packages contain the weight which he marks upon them. A question arises only when he markets a package which is short in weight; then he may be allowed a "reasonable variation" or "tolerance." While, of course, one seeking to evade the statute may have difficulty in determining the extent of this twilight zone created for his benefit, a definite course of conduct is provided for the honest trader which he may always pursue with the knowledge in advance that he is not violating the statute; for so long as his packages contain full weight it is plain that he has committed no violation of the law. The infirmity in the statute involved in the *Cohen Grocery* case was that it fixed no standard, so that no act could be certainly immune from criminal consequence. In the present case a definite standard is provided, and the defendant is informed in advance that if he gives full weight he will be subject to no penalty.

This distinction was well stated by the court in *United States* v. *Merchants Biscuit Co.,* decided October 25, 1924, unreported, in which the District Court for Colorado held that the statute now involved was constitutional. In a memorandum opinion the court said:

> I do not think that *U. S.* v. *Cohen Grocery Co.,* 255 U. S. 81, and similar cases construing the food control act, otherwise known as the Lever Act, are in point. That statute

clearly did not fix an ascertainable standard of guilt that in any way informed a defendant accused of violating the act of the charge against him.

The act in question here, however, is very specific that the weight and measure, or numerical count, must be plainly stated on the package, in so many words. There can be no doubt as to what the producer or manufacturer must do under that provision, and it is not made uncertain because a "reasonable variation" shall be permitted. That does not mean that persons subject to the act do not have to be accurate in their representations, and that they do not have to ascertain and affix the weight, measure, or numerical count at the time they put up the package, etc. It does mean, that if, due to causes over which they have no control an unavoidable variation occurs after the goods leave their possession, then the law is not violated if the variation is a reasonable one.

That part of the section which is attacked, therefore imports common sense or the rule of reason into the act, and does not require the impossible. But for this provision we might be compelled to hold it unconstitutional under the doctrine of *Burns Packing Co.* v. *Bryans,* 264 U. S. 504, as imposing an intolerable burden, or impossible requirement.

Another distinction between the statute involved in the *Cohen Grocery* case and the Food and Drugs

Act is readily apparent. The Lever Act provided for a fine up to $5,000 or for imprisonment up to two years or both. It thus created a serious criminal offense subject to severe punishment. The Food and Drugs Act is a regulatory and remedial statute. The maximum penalty for a first offense against its provisions is a fine of $200. Quite apart from the applicability of the Sixth Amendment to offenses under the Food and Drugs Act, which we discuss below, we believe that the Constitution requires no such rigid certainty in provisions like those here involved as it does in defining a serious criminal offense for which the punishment may be imprisonment in the penitentiary.

Moreover, the Sixth Amendment, upon which the court below relied, seems to have no application to this case, because the prosecution of an offense under the Food and Drugs Act is not a "criminal prosecution" within the meaning of that amendment. It is at most a petty offense, to the prosecution of which the guarantees of the Sixth Amendment are inapplicable.

The penalty provided in Section 2 of the Food and Drugs Act (*infra*, pp. 26–27) for a violation of the provisions of the Act is a fine "not exceeding two hundred dollars for the first offense." Thus the offense with which the defendant was

charged in this case was a "petty offense." In at least two cases it has been directly held that a violation of the Food and Drugs Act is a petty offense (*Frank* v. *United States,* 192 Fed. 864 (C. C. A. 6th); *Huyler's* v. *Houston,* 41 App. D. C. 452), and several decisions on related questions sustain this view.[6] Furthermore, the offense falls within the definition of "petty offense" contained in the Act of December 16, 1930, c. 15, 46 Stat. 1029 (U. S. C. Sup. V, Title 18, Sec. 541; *infra,* p. 31).[7]

This Court has repeatedly upheld the view that "petty offenses" may be tried without a jury. *Callan* v. *Wilson,* 127 U. S. 540, 557; *Schick* v. *United*

[6] It is held that prosecution under the Act may be begun by information. *United States* v. *J. Lindsay Wells Co.,* 186 Fed. 248 (W. D. Tenn.); *United States* v. *Wells,* 225 Fed. 320 (W. D. Tenn.); *United States* v. *Weeks,* 225 Fed. 1017 (S. D. N. Y.); *United States* v. *J. L. Hopkins & Co.,* 228 Fed. 173 (S. D. N. Y.). And conviction may be had under the Act without showing criminal intent. *Von Bremen* v. *United States,* 192 Fed. 904, 906 (C. C. A. 2d); *United States* v. *Sprague,* 208 Fed. 419 (E. D. N. Y.). See *United States* v. *Thirty-six Bottles of London Dry Gin,* 210 Fed. 271 (C. C. A. 3d); *United States* v. *Thirteen Crates of Frozen Eggs,* 215 Fed. 584 (C. C. A. 2d); *United States* v. *Two hundred sixty-seven Boxes of Macaroni,* 225 Fed. 79 (W. D. Pa.). *Dr. J. H. McLean Medicine Co.* v. *United States,* 253 Fed. 694 (C. C. A. 8th), is apparently to the contrary.

[7] This statutory definition of "petty offenses" was enacted some time after the commission of the offenses alleged in the indictment in this case. But as the statute seems to be declaratory of the preëxisting law, there is no objection to its application in the present case.

States, 195 U. S. 65, 70–71; *District of Columbia* v. *Colts,* 282 U. S. 63, 72–73.[8] See also Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,* 39 Harvard Law Review 917. In the *Colts* case, *supra,* this Court said (282 U. S. at pp. 72–73):

> By § 165 of the D. C. Code [*infra,* pp. 31–32], the Constitution is made the test—as, of course, it must be—to determine whether the accused be entitled to a jury trial. Article III, § 2, cl. 3, of the Constitution provides that "The trial of all crimes, except in cases of impeachment, shall be by jury." This provision is to be interpreted in the light of the common law, according to which petty offenses might be proceeded against summarily before a magistrate sitting without a jury. See *Callan* v. *Wilson,* 127 U. S. 540, 557. That there may be many offenses called "petty offenses" which do not rise to the degree of *crimes* within the meaning of Article III, and in respect of which Congress may dispense with a jury trial, is settled. *Schick* v. *United States,* 195 U. S. 65.

If Congress may provide that "petty offenses" may be tried without a jury, such a proceeding can not be a "criminal prosecution" within the meaning of the Sixth Amendment, for that Amendment

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[8] See also *Ex parte Milligan,* 4 Wall. 2, 123; *Counselman* v. *Hitchcock,* 142 U. S. 547, 563; *United States* v. *Zucker,* 161 U. S. 475, 481. Offenses against the Food and Drugs Act may be tried in the police court of the District of Columbia. *Huyler's* v. *Houston,* 41 App. D. C. 452.

guarantees the right of trial by jury in all criminal prosecutions. It follows from this that the other provisions of the Sixth Amendment (contained in the same sentence as the clause conferring the right to trial by jury) are not applicable to trials for "petty offenses."

CONCLUSION

The judgment of the District Court is erroneous and should be reversed.

Respectfully submitted.

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SEPTEMBER, 1932.

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTES

The Act of June 30, 1906, c. 3915, 34 Stat. 768, 770 (U. S. C., Title 21, Secs. 2, 3, 9, 10), known as the Pure Food and Drug Act, provides in part as follows:

> SEC. 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided,* That no article shall be deemed

misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act.

SEC. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

* * * * *

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs, or ar-

ticles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded:

In case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.*

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear

* An additional paragraph "Third" was inserted here by the Act of August 23, 1912, c. 352, 37 Stat. 416. It is not material in this case.

a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.[10]

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided,* That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided,* That the term

[10] This paragraph was amended by the Act of March 3, 1913, c. 117, 37 Stat. 732, which is set out in full, *infra*, pp. 30–31.

blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further,* That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding.

The Act of March 3, 1913, c. 117, 37 Stat. 732, known as the Gould Amendment, provides as follows:

That section eight of an Act entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved June thirtieth, nineteen hundred and six, be, and the same is hereby, amended by striking out the words "Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package," and inserting in lieu thereof the following:

"Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, numerical count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act."

SEC. 2. That this Act shall take effect and be in force from and after its passage: *Provided, however,* That no penalty of fine, imprisonment, or confiscation shall be enforced for any violation of its provisions as to domestic products prepared or foreign products imported prior to eighteen months after its passage.

The Act of December 16, 1930, c. 15, 46 Stat. 1029 (U. S. C. Sup. V, Title 18, Sec. 541), provides as follows:

That section 335 of the Criminal Code, chapter 321, paragraph 335; Thirty-fifth Statutes, page 1152 (sec. 541, title 18, U. S. C.), be amended to read as follows:

"All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors: *Provided,* That all offenses the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint."

The Act of March 3, 1901, c. 854, Sec. 44, 31 Stat. 1189, 1196, as amended by the Act of March 3, 1925, c. 443, Sec. 4, 43 Stat. 1119, 1120 (D. C. Code, Title 18, Sec. 165) provides as follows:

Prosecutions in the police court shall be on information by the proper prosecuting officer. In all prosecutions within the jurisdiction of said court in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused

shall in open court expressly waive such trial by jury and request to be tried by the judge, in which case the trial shall be by such judge, and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury.

In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury. In all cases where the said court shall impose a fine it may, in default of the payment of the fine imposed, commit the defendant for such a term as the court thinks right and proper, not to exceed one year.

APPENDIX B

EXTRACTS FROM COMMITTEE REPORTS AND HEARINGS

In the Report of the House Committee on Interstate and Foreign Commerce on the bill which, with some amendments, became the Act of March 3, 1913, involved in this case, it was stated (House Report No. 850, 62nd Congress, 2d Session, pp. 2–4):

> It being apparent to everyone that it is impossible to make packages of exactly the same size or to pack them with exactly the same quantity of contents, and it being also apparent that the exact weight and measure of the contents of a package may undergo slight changes from natural causes, it is also apparent that legislation requiring similar packages to contain the same exact quantity in terms of weight or measure, without allowing for any variation, would be destructive and prevent the putting of foods in packages.
>
> The matter of marking the quantity of contents of food packages has received widespread attention from the manufacturers and producers of foods; from the jobbers and wholesale and retail dealers in foods; from the officials of both the National Government and the different States who are charged with duties in reference to weights and measures; and from those interested in the protection of purchasers and consumers of packed foods. The result of the consider-

ation which has been given to the subject is expressed in the bill which is now reported.

* * * * *

The bill as reported proposes as to those articles classed as "food products" under the terms of the pure-food law, that if they shall be in package form the quantity of the contents shall be plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count, provided, however, that reasonable variations shall be permitted. It is also provided that tolerances shall be established by the Secretary of Agriculture, Secretary of Commerce and Labor, and Secretary of the Treasury by rules and regulations in accordance with the general provisions of the pure-food act. Under the terms of the bill reasonable variations are permitted, whether tolerances are or are not established by the rules and regulations, nor will the tolerances established by the rules and regulations be conclusive upon the courts in determining the question of the reasonableness of the variations, but the establishment of tolerances by rules and regulations will undoubtedly be a great aid to the producers of food products in package form by letting them know in advance what the Government officials believe to be reasonable variations. The establishment of tolerances will also be a great aid to the officials both of the General Government and of the States in connection with the enforcement of the law.

* * * * *

The bill has the indorsement of the National Retail Grocers' Association, the National Wholesale Grocers' Association, the National Canners' Association, the National Confectioners' Association, the American

Specialty Manufacturers' Association, the Chocolate and Cocoa Manufacturers' Association of the United States, the National Flavoring Extract Association, the California Fruit Growers' Association, the Machine Bottle Manufacturers' Association, the Glass Bottle Blowers' Association, the Association for the Promotion of Purity in Foods, the International Stewards' Association, the Southern Hotel Men's Association, the Canners' League of California, the Dried Fruit Association of California, the Association of National and State Dairy and Food Departments, the National Consumers' League Food Committee, the American Flint Glass Workers' Union of the United States and Canada, and various other associations, officials, and individuals, who have given special attention to the subject.

The same language was contained in the Report of the Senate Committee on Manufactures (S. Rep. No. 1216, 62d Cong., 3d Sess., pp. 2–4). This Senate Report also contained some 75 pages of testimony which was taken before the Senate Committee. From this testimony it appears that it was the desire of the trade that the statute require a statement of weight on packaged goods in place of the permissive provision in the original Pure Food and Drug Act. It appeared that several States had already enacted compulsory weight-branding laws and that of these a number provided that reasonable variations should be permitted. During the hearing it was suggested (p. 11) that the measure "certainly would not comply with the recognized rule that a law should be certain in its provisions." But the witness, representing the

National Wholesale Grocers' Association, replied (pp. 12, 16):

> We think such variations, phrased in some language or other, must be granted. It is not a human possibility to put upon every package the true weight or measure.
>
> * * * * *
>
> Now, on that point also it was pointed out in another case in the Supreme Court that a statute of this kind is remedial—it is not a criminal statute. This provision in a strictly criminal statute, where criminal intent must be shown by the Government, would, I admit, vitiate it. But it seems to me a statute of this kind falls within the words of the Supreme Court, in the case of *Taylor* v. *The United States* (3 How. 197), in which Mr. Justice Story said:
>
> "Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in a strict sense, penal acts, although they may inflict a penalty for violation."
>
> Now, the food law does not require as a condition precedent of conviction any criminal intent whatever on the part of the manufacturer, and to that extent it is certainly not a criminal statute. It is nothing more than a quasicriminal statute, and I very frankly admit Senator Heyburn's objection that a provision of this kind was never found in a strictly criminal statute of this country, but that is not so as to remedial statutes.

Similar statements as to the necessity and desirability of the amendment were made by many other witnesses before the committee.

APPENDIX C

REGULATIONS

On May 11, 1914, Regulation 29 of the Rules and Regulations For the Enforcement of the Food and Drugs Act was amended to read as follows (Food Inspection Decision 154):

Statement of Weight, Measure, or Count. (Section 8, paragraph 3, under "Food," as amended by act of March 3, 1913)

(*a*) Except as otherwise provided by this regulation, the quantity of the contents, in all cases of food, if in package form, must be plainly and conspicuously marked, in terms of weight, measure, or numerical count, on the outside of the covering or container usually delivered to consumers.

(*b*) The quantity of the contents so marked shall be the amount of food in the package.

(*c*) The statement of the quantity of the contents shall be plain and conspicuous, shall not be a part of or obscured by any legend or design, and shall be so placed and in such characters as to be readily seen and clearly legible when the size of the package and the circumstances under which it is ordinarily examined by purchasers or consumers are taken into consideration.

(*d*) If the quantity of the contents be stated by weight or measure, it shall be marked in terms of the largest unit contained in the package; for example, if the package contain a pound, or pounds, and a

fraction of a pound, the contents shall be expressed in terms of pounds and fractions thereof; or of pounds and ounces, and not merely in ounces.

(*e*) Statements of weight shall be in terms of avoirdupois pounds and ounces; statements of liquid measure shall be in terms of the United States gallon of 231 cubic inches and its customary subdivisions, i. e., in gallons, quarts, pints, or fluid ounces, and shall express the volume of the liquid at 68° F. (20° C.); and statements of dry measure shall be in terms of the United States standard bushel of 2,150.42 cubic inches and its customary subdivisions, i. e., in bushels, half bushels, pecks, quarts, pints, or half pints: *Provided,* That, by like method, such statements may be in terms of metric weight or measure.

(*f*) The quantity of solids shall be stated in terms of weight and of liquids in terms of measure, except that in case of an article in respect to which there exists a definite trade custom otherwise, the statement may be in terms of weight or measure in accordance with such custom. The quantity of viscous or semisolid foods, or of mixtures of solids and liquids, may be stated either by weight or measure, but the statement shall be definite and shall indicate whether the quantity is expressed in terms of weight or measure, as, for example, "Weight, 12 ounces," or "12 ounces avoirdupois"; "volume, 12 ounces," or "12 fluid ounces."

(*g*) The quantity of the contents shall be stated in terms of weight or measure unless the package be marked by numerical count and such numerical count gives accurate information as to the quantity of the food in the package.

(*h*) The quantity of the contents may be stated in terms of minimum weight, minimum measure, or minimum count, for example, "minimum weight, 16 ounces"; "minimum volume, 1 gallon"; or "not less than 4 ounces"; but in such case the statement must approximate the actual quantity, and there shall be no tolerance below the stated minimum.

(*i*) The following tolerances and variations from the quantity of the contents marked on the package shall be allowed:

(1) Discrepancies due exclusively to errors in weighing, measuring, or counting which occur in packing conducted in compliance with good commercial practice.

(2) Discrepancies due exclusively to differences in the capacity of bottles and similar containers resulting solely from unavoidable difficulties in manufacturing such bottles or containers so as to be of uniform capacity: *Provided,* That no greater tolerance shall be allowed in case of bottles or similar containers which, because of their design, can not be made of approximate uniform capacity than is allowed in case of bottles or similar containers which can be manufactured so as to be of approximate uniform capacity.

(3) Discrepancies in weight or measure due exclusively to differences in atmospheric conditions in various places, and which unavoidably result from the ordinary and customary exposure of the packages to evaporation or to the absorption of water.

Discrepancies under classes (1) and (2) of this paragraph shall be as often above as below the marked quantity. The reasonableness of discrepancies under class (3) of this paragraph will be determined on the facts in each case.

(*j*) A package containing two avoirdupois ounces of food or less is "small" and shall be exempt from marking in terms of weight.

(*k*) A package containing one fluid ounce of food or less is "small" and shall be exempt from marking in terms of measure.

(*l*) When a package is not required by paragraph (*g*) to be marked in terms of either weight or measure, and the units of food therein are six or less, it shall, for the purpose of this regulation, be deemed "small" and shall be exempt from marking in terms of numerical count.

This regulation remains in force to-day without alteration, except for a few changes in phraseology. There have been no changes in paragraph (*i*), which is the paragraph material in this case. The regulation is now known as Regulation 26 of the Rules and Regulations under the Food and Drugs Act, of which the ninth edition was promulgated August 29, 1927.

APPENDIX D

SUMMARY OF STATUTORY PROVISIONS OF THE STATES AND TERRITORIES

The following statutory provisions are the same as or substantially similar to Section 8 of the Federal Food and Drug Act, as amended by the Act of March 3, 1913, in that they provide a penalty for false branding, with a proviso that "reasonable variations" or "tolerances" shall be allowed.[11].

Alabama: Agricultural Code (1927), Sec. 255.

Alaska: No territorial food and drug law; under Sec. 1 of the Federal Act, that Act applies.

California: Cal. Stat. 1913, p. 1086, Sec. 6, as amended by Cal. Stat. 1917, p. 1648.

Connecticut: General Stats. (1930), Sec. 2441.

District of Columbia: No local food and drug law; under Sec. 1 of the Federal Act, that Act applies.

Florida: Comp. Gen. Laws (1927), Sec. 3204.

Georgia: Code (1926), Sec. 2104.

Hawaii: Rev. Laws (1925), Sec. 994; under Sec. 1 of the Federal Act, that Act also applies.

Illinois: Rev. Stat. (1929), c. 56b, Sec. 9.

Iowa: Code (1931), Sec. 3037.

Louisiana: Anno. Rev. Stat. (Marr, 1915), Sec. 689.

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[11] The complete texts of all Federal and State statutes and regulations relating to food and drugs may be found in Dunn, Food and Drug Laws, 3 vols., 1927–1928.

Maine: Rev. Stat. (1930), c. 41, Sec. 20.

Maryland: Anno. Code (Bagby, 1924), Art. 43, Sec. 192.

Massachusetts: Gen. Laws (1921), c. 94, Sec. 192.

Michigan: Comp. Laws (1929), Sec. 5428.

Minnesota: Statutes (Mason, 1927), Sec. 3792.

Missouri: Rev. Stat. (1929), Sec. 13022.

Nevada: Comp. Laws (1929), Sec. 8295.

New Hampshire: Pub. Laws (1926), c. 139, Sec. 7.

New Jersey: Comp. Stat. (Supp. 1924), Sec. 81–4.

New York: Cons. Laws (1930), c. 1, Sec. 194.

North Carolina: Code (1931), Sec. 4760.

Oregon: Code (1930), Sec. 41–216.

Rhode Island: Gen. Laws (1923), Sec. 2383.

South Dakota: Comp. Laws (1929), Sec. 7809.

Tennessee: Code (1932), Sec. 6585.

Texas: [Sec. 8 of c. 130 of the Acts of 1919, which was held unconstitutional in *Ex Parte Humphrey*, 92 Tex. Crim. 501, was repealed in 1923. Texas Laws, 38th legislature, 1st, 2nd, 3rd called sessions, c. 53, Sec. 10.]

Utah: Comp. Laws (1917), Sec. 1928.

Vermont: Gen. Laws (1917), Sec. 6270.

Virginia: Code (1924), Sec. 1182.

Washington: Code (Pierce, 1929), Sec. 2538.

Wisconsin: Statutes (1929), Sec. 352.08.

Wyoming: Rev. Stat. (1931), Sec. 45–109.

In the following States statutes are in force which are substantially the same as Section 8 of the Federal Food and Drug Act, as it was before it was amended by the Act of March 3, 1913. These

statutes make no provision for "reasonable variations" or "tolerances."

Arkansas: Digest of Stats. (1921), Sec. 4823.
Colorado: Comp. Laws (1921), Sec. 1002.
Delaware: Laws of 1921, c. 190, Sec. 4.
Idaho: Comp. Stat. (1919), Sec. 1692.
Indiana: Statutes (Burns, 1926), Sec. 8228.
Kansas: Rev. Stat. (1923), Sec. 65–608.
Kentucky: Statutes (1930), Sec. 2060a–2.
Mississippi: Code (1930), Sec. 4962.
Montana: Rev. Code (1921), Sec. 2587.
Nebraska: Comp. Stat. (1929), Sec. 81–904.
North Dakota: Comp. Laws (Supp. 1925), Sec. 2889b6. [Comp. Laws (1913), Sec. 3010, provided for "reasonable variations," but this section was repealed by N. D. Laws 1923, c. 222, Sec. 27.]
Ohio: Gen. Code, Sec. 5785.
Oklahoma: Statutes (1931), Sec. 4543.
Pennsylvania: Stats. Ann., Title 31, Sec. 4.
South Carolina: Code (1922), Crim. L., Sec. 398.
Texas: Penal Code (1925), Art. 708.

The statutes of Arizona and New Mexico contain no comparable provision. See Arizona Rev. Code (1928), Secs. 3608–35; New Mexico Ann. Stat. (1929), Secs. 53–101 to 53–123.

ENGLISH STATUTES

By Section 12 of the Sale of Food (Weights and Measures) Act, 1926 (16 & 17 Geo. V, c. 63), it is provided that in any proceeding under the Act "the court shall disregard any inconsiderable variation in the weight or measure of a single article, and shall have regard to the average weight or measure

of a reasonable number of other articles of the same kind (if any) sold or delivered by the defendant, or in his possession for the purpose of sale or delivery, on the same occasion, and generally to all the circumstances of the case." It is also provided that the defendant shall be discharged if he "proves to the satisfaction of the Court that such deficiency was due to a *bona fide* mistake or accident, or other causes beyond his control, and in spite of all reasonable precautions being taken * * *."

See also the Weights and Measures Act, 1904, 4 Edw. VII, c. 28, Sec. 5.

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FILE COPY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 19

THE UNITED STATES OF AMERICA, Appellant,

versus

SHREVEPORT GRAIN & ELEVATOR COMPANY.

On Appeal from the District Court of the United States for the Western District of Louisiana.

BRIEF FOR SHREVEPORT GRAIN AND ELEVATOR COMPANY.

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BRIEF FOR SHREVEPORT GRAIN AND ELEVATOR COMPANY.

A statement of the case is contained on pages two and three of the Government's brief.

Summary of Argument.

The Act here in question is invalid and unconstitutional because it fails to define with the requisite certainty

the offense thereby denounced. It therefore conflicts with Articles 5 and 6 of the Amendments to the Constitution, in that it operates to deprive persons protected by the Constitution of their liberty and their property without due process of law, and ignores the constitutional right of the accused to be informed of the nature and cause of the accusation. *United States v. Cohen Grocery Company, 255 U. S. 81; United States v. Reese, 92 U. S. 214; United States v. Brewer, 139 U. S. 278; Todd v. United States, 154 U. S. 282; Cline v. Frink Dairy Company, 274 U. S. 445; Connally v. General Construction Company, 269 U. S. 385; Champlain Refining Company v. Commission, 286 U. S. 210; Smith v. Cahoon, 283 U. S. 533; Small Company v. American Sugar Refining Company, 267 U. S. 233; Yu Cong Eng v. Trinidad, 271 U. S. 500.* The infirmity of the Act is not cured by departmental regulations. *United States v. United Verde Copper Co., 196 U. S. 205; Morrill, Collector, v. Jones, 106 U. S. 466; United States v. Eaton, 144 U. S. 677; Williamson v. United States, 207 U. S. 426; Burnet, Commissioner, v. Chicago Portrait Co., 286 U. S. —.* The Act likewise is in conflict with Articles 1, 2 and 3 of the Constitution which separate the Government into legislative, executive and judicial branches, in that it attempts to confer legislative powers upon the executive department and the courts. *United States v. Reese, 92 U.S. 214; Cline v. Frink Dairy Co., 274 U. S. 445; United States v. United Verde Copper Co., 196 U. S. 205; Morrill, Collector, v. Jones, 106 U. S. 466; United States v. Eaton, 144 U. S. 677.* Under the Criminal Appeals Act, this Court will review only the particular point passed upon by the court below. The Government cannot change its theory of the case and present for the first time in this court ques-

tions which were not submitted to or passed upon by the District Court, and which have not been made the subject of any specific assignment of error. *United States v. Stevenson, 215 U. S. 194.*

ARGUMENT.

I. The Statute does not Validly Define a Criminal Offense, and by Reason of its Uncertainty is Invalid under the Fifth and Sixth Amendments.

At the outset we desire to emphasize that we are considering this statute in its aspect as legislation creating a criminal offense and providing for its punishment, as distinguished from the appropriate civil remedies available under the Act. In this aspect, the numerous cases which have been decided treating of enforcement of the Act through the civil process of the courts are not applicable. The cases cited in the Government's brief dealing with civil proceedings likewise may be distinguished on this ground. *Levy Leasing Company vs. Siegel, 258 U. S. 241, 250.*

This prosecution is laid under the third paragraph of Section 8 of the Food and Drugs Act of 30th June, 1906, as amended, which relates to misbranding, and provides that an article of food shall be construed to be misbranded—

> "Third. If in package form, the quantity and the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure or numerical count; provided however, that reasonable variations shall be permitted, and tolerances and also exemptions as to small

packages shall be established by rules and regulations made in accordance with the provisions of Section 3 of this Act."

By Section Three of the Act it is provided that the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of the Act.

The language of the Act as quoted is in substance a prohibition that there shall be any unreasonable variation in the weight, measure or numerical count of the quantity and contents of any package from that marked on the outside of the package. Reasonable variations are lawful; unreasonable variations are forbidden.

It is respectfully submitted that the language of the statute fixes no ascertainable standard of guilt and is too indefinite and uncertain to afford a valid definition of a crime.

An authoritative expression upon the question of the certainty with which crimes must be defined by acts of Congress is contained in *United States v. Cohen Grocery Company, 255 U. S. page 81.* The case involved a prosecution under the Lever Food Control Act which made it an offense, among other things, to "make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries * * * ." The Cohen Grocery Company was alleged to have made an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, namely, sugar, by having made a sale of 50 pounds of

sugar for $10.17, and having made a sale of a 100 pound bag of sugar for $19.50. The defendant demurred to the indictment on the ground, among others, that the indictment was so vague as not to inform the accused of the nature and cause of the accusation and that the statute upon which the indictment was based was subject to the same infirmity because it was so indefinite as not to enable it to be known what was forbidden, and therefore amounted to a delegation by Congress of legislative power to courts and juries to determine what acts should be held to be criminal and punishable. The Court, in an opinion rendered by Chief Justice White, held that this contention was correct and that the Act, insofar as applied to the defendant in that case, was unconstitutional and void. The language of Chief Justice White on this point is as follows:

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the test in question; that is, whether the words 'that it is hereby made unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted the fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not we are of the opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact we see no reason to doubt the soundness of the

observation of the court below in its opinion to the effect that to attempt to enforce this section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

The language of the Lever Act making it unlawful for any person wilfully to make any "unjust or unreasonable rate or charge" is indistinguishable in substance from the language of the Food and Drug Act above quoted, prohibiting unreasonable variations in weight, measure or count from that marked on the outside of the package. The test under the Lever Act was whether the rate or charge was reasonable. The test under the Pure Food and Drug Act is whether the variation is reasonable.

In *United States v. Reese, 92 U. S., p. 214*, a prosecution was had under the Act of Congress of May 31, 1870, passed under authority of the 15th amendment to protect the recently enfranchised colored people in the exercise of the right of suffrage. Certain election officials of the State of Kentucky were indicted for having violated the provisions of the act. The opinion in the case was written by Mr. Chief Justice Waite who, in examining the provisions of the act relied upon by the Government to sustain the prosecution, held such provisions to be insufficient and affirmed the judgment of the Circuit Court which had sustained demurrers to the indictments. During the course of the opinion Chief Justice Waite said:

"Penal statutes ought not to be expressed in language so uncertain. If the Legislature undertakes to define by statute a new offense and provide

for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

At another point in the opinion the Chief Justice remarked:

"It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and find who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government. The courts enforce the legislative will when ascertained if within the constitutional grant of power. Within its legitimate sphere Congress is supreme and beyond the control of the courts, but if it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and, when called upon in due course of legal proceedings, must annul its encroachments upon the reserve power of the states and the people."

In *United States v. Brewer, 139 U. S. 278, 35 L. Ed. 191*, it is said:

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. Before a man can be punished his case must be plainly and unmistakably within the statute."

To the same effect is *Todd v. United States, 154 U. S. 282*, which involved a prosecution under an act penalizing the intimidation or threatening of witnesses "in any court of the United States." The accused was indicted for having conspired to threaten and injure certain witnesses who had been called to give testimony in a preliminary ex-

amination before a United States Commissioner. The Court held that the indictment was defective for the reason that the United States Commissioner was not a court of the United States within the meaning of the statute and, in the course of its opinion, said:

> "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment and that no act however wrongful can be punished under a statute unless clearly within its terms."

In the case of *Cline v. Frink Dairy Company, 274 U. S. 445*, the constitutionality of the anti-trust law of the State of Colorado was involved. The act was framed in a way similar to the one here under consideration. In the first five paragraphs of section one of the act, the Legislature defined conspiracies and combinations which should be unlawful. But the act there, as here, went further and contained a proviso to the effect that no agreement or association should be deemed to be unlawful or within the provisions of the law, the objects and purposes of which were to conduct operations at a reasonable profit or to market at a reasonable profit those products which could not otherwise be so marketed. This Court held the act to be invalid, saying:

> "Such an exception in the statute leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused. And attempts to enforce the section will be to penalize and punish all combinations in restraint of trade in a commodity when, in the judgment of the court and jury, they are not necessary to enable those engaged in it to make it reasonably profitable, but not otherwise. Such a basis for judgment of a crime would be more impracticable and complicated

than the much simpler question in the L. Cohen Grocery Company case, whether a price charged was unreasonable or excessive. The real issue which the proviso would submit to the jury would be legislative, not judicial. * * *."

In *Connally v. General Construction Company, 269 U. S. 385*, this Court quoted with approval from the case of *United States v. Capitol Traction Company, 34 App. (D. C.) 592*, as follows:

"* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different construction. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one construction of the requirement and the court upon another."

The principle of the foregoing authorities was again approved in the recent case of *Champlin Refining Company v. Commission, 286 U. S. 210, 243*, the Court saying:

"It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."

Compare, also, *Smith v. Cahoon, 283 U. S. 553, 564; Small Company v. American Sugar Refining Co., 267 U. S. 233, 239; Yu Cong Eng v. Trinidad, 271 U. S. 500.*

The cited cases establish that in criminal statutes it is necessary that the Legislature draw a line clearly distinguishing between what is permissible and what is forbidden. The fundamental defect in the statute under consideration is that no such line is drawn. The Government apparently contends in its brief that the line comprehends and requires exact correspondence between the weight of the package and the recitals upon the label. This is a departure from its theory as presented to the court below, where it was conceded that it was the function of the jury to determine the reasonableness of the variation in any given case.(1) But the answer to this argument is that the statute in plain language expressly negatives the idea now advanced by providing that variations from this line shall be allowed. The fact of variation between contents and label, therefore, does not of itself involve a violation of the statute. The line sought to be established by the statute is in some obscure zone above or below the marked contents where the discrepancy may have gone beyond a point which the jury in any given case may think reasonable. It is obvious that different juries may entertain widely divergent views on this point. In the case at bar, the charge is made in Count 1 of the Indictment that sacks of cornmeal, labeled "96 pounds net," contained some 20 ounces less than 96 pounds. This variation is less than 2%. In contrast, reference may be made to the case of

(1) In the Government's brief in the District Court, the following statement is made: "Thus by showing the amount of the variation it is made apparent on the face of the information that we are dealing with such substantial variations as to make the determination as to their reasonableness or unreasonableness a proper question for the jury."

Burns Baking Company v. Bryan, 264 U. S. 503, which involved a statute of the State of Nebraska regulating the permissible variations in respect of loaves of bread. The statutory margin of tolerance was two ounces to the pound, or 12½%. This Court held that the variation allowed by the statute was too narrow, and set aside the Act as arbitrary and oppressive. Moreover, as we read the Government's brief (page 7), it is freely conceded that it is impossible to have an exact correspondence between weight and label. The House Committee on Interstate and Foreign Commerce was of the same view and stated, in effect (Appendix-B, Government's brief, page 33), that if exact correspondence were required the statute would be destructive and prevent the putting of foods in packages. The argument of the Government insisting upon such exact correspondence would therefore make all persons who shipped goods in packages violators of the law. The net is thus set large enough to catch all shippers, leaving it for the courts to step in and say who shall be punished. This is exactly what was condemned by this Court in *United States v. Reese, 92 U. S., p. 214.*

II. The Infirmity of the Act Is Not Cured by Departmental Regulations.

In the discussion contained on pages 10, 11 and 12 of the Government's brief, regulations issued pursuant to the Act are quoted and apparently are relied upon to support this prosecution. An answer to this argument involves an inquiry into the powers of the secretaries of the executive departments of the Government to make regula-

tions to supplement acts of Congress. In this connection we refer to some of the leading cases in this field:

The case of *United States v. United Verde Copper Company, 196 U. S. p. 205*, involved an act of Congress providing for the use of timber on the public lands in Arizona and other states subject to rules and regulations to be prescribed by the Secretary of the Interior. The action was to recover from the copper company for timber alleged to have been cut and removed in violation of the Act and of the regulations. The copper company had removed the timber for the purpose of roasting ore. The United States contended that roasting ore is smelting and that smelting was not a purpose permitted by the Act and was forbidden by the regulations of the Secretary of the Interior. The copper company demurred to the bill and the demurrer was sustained. The judgment was affirmed by the Supreme Court which, in discussing the nature of the regulation made pursuant to the Act by the Secretary of the Interior, said:

> "But the Government relies on the rules and regulations of the Secretary of the Interior promulgated under, as it is contended, the authority of the statute. Since United States vs. Richmond Mining Company was decided, No. 7 of those regulations provides that 'no timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.' By this the Secretary of the Interior may have intended to upset the ruling in United States vs. Richmond Mining Company, but to which industry the roasting of ore shall be assigned the Secretary does not say, and the considerations which we have expressed apply as well to the regulations as to the statute. But there is a more absolutely fatal objection to the regula-

tion. The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This we think is beyond his power. Smelting may be a separate industry from mining, but that does not deprive it of the license given by the statute. As we have already said, the general clause 'other domestic purposes' is as much a grant of permission to the industries designated by it to use timber as though they had been expressly enumerated, and their rights are as inviolable as the rights of the industries which are enumerated. The industries meant by the general clause may receive indeed limitation from those enumerated; in other words, be limited to the conditions existing in the mining states and territories when the statute was enacted, but there can be no doubt that smelting has such relation. If Rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term he can another. If he can abridge he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."

In *Morrill, Collector, v. Jones, 106 U. S. 466*, it was held that the Secretary of the Treasury cannot by his regulations alter or amend a law. In this case the Court, in the course of its opinion, said:

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the Collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of superior stock. This is manifestly an attempt to put into

> the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals especially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

United States v. Eaton, 144 U. S. 677, was a case involving the prosecution of a dealer in oleomargarine who failed to keep a book showing the oleomargarine received by him and from whom received, and certain other records as required by regulations made by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. The Court, in discussing the power of the Secretary to make regulations whereby offenses against the United States were sought to be created, referred with approval to *Morrill v. Jones* and, in again applying the rule, went on to say:

> "Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the object of criminal procedure is an act committed or omitted 'in violation of a public law either forbidding or commanding it.' It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue as a needful regulation under the oleomargarine act for carrying it into effect could be considered as a thing required by law in the carrying on or conducting of the business of a wholesale dealer in oleo-

margarine in such a manner as to become a criminal offense punishable under Section 18 of the Act. * * *

"Regulations prescribed by the President and by the heads of departments under authority granted by Congress may be regulations prescribed by law so as lawfully to support acts done under them and in accordance with them and may thus have in a proper sense the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

Williamson v. United States, 207 U. S. 426, was a case where the defendant, Williamson, was prosecuted for conspiracy to suborn perjury, it being charged that he conspired to commit the crime in proceedings for the purchase of public land under the authority of the law commonly known as the Timber and Stone Act. The inquiry of the Court, pertinent to the discussion here, involved the question of whether the affidavit which it was claimed had been falsely made was one required to be made by the Act of Congress. The Court determined that the Act itself did not require the affidavit upon which the prosecution was based, but that such affidavit had been required only by regulation made by the Commissioner of the General Land Office. The Court held that the Commissioner had no power or authority to make this requirement and, among other things, said:

"True it is that in the concluding portion of Section 3 of the Timber and Stone Act it is provided

> that 'effect shall be given to the foregoing provisions of this Act by regulations to be prescribed by the Commissioner of the General Land Office,' but this power must, in the nature of things, be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute and cannot be held to have authorized him by such an exercise of power to virtually adopt rules and regulations destructive of rights which Congress had conferred. * * *."

Compare, also, the recent case of *Burnet, Commissioner, v. Chicago Portrait Company*, decided Feb. 23, 1932, Advance Opinions October Term 1931, where the Court considered the sense in which the term "foreign country" was used in a statute, and held that the regulations of the Commissioner of Internal Revenue in respect of that expression were not in accord with the meaning of the statute, and that such regulations would not be given effect in the case before the Court.

A study of the cases above cited discloses that it is within the power of Congress to vest in executive officers the power to make necessary rules and regulations to enforce the provisions of the law, but that Congress cannot delegate its power to make laws to an executive department or to an administrative officer, nor confer upon any such officer or the courts the power to determine what the rule of law shall be. In fine, Congress must prescribe the rule; details of execution may be established by regulation. In no event can the regulations alter, amend, or go beyond the provisions of the Act. Who is to decide in any given

case whether the regulations exceed proper bounds? If the secretaries have determined upon variations which they consider reasonable, are such determinations conclusive? Who is to say whether the regulations are not themselves unreasonable? Under the cited cases the answer to these questions is that the Court has the right, power and duty to say whether the regulations go beyond the power conferred by Congress. In the instant case, a trial by jury must be had and the question decided by the jury. The jury must determine as a matter of fact whether the variations of weight in the packages shipped are reasonable under the circumstances. This brings the whole problem back to the beginning, namely, whether it is permissible to delegate to the jury the power and duty of determining in any given case as to what acts shall constitute an offense, being guided in its determination by the rule as to whether the acts disclosed are reasonable or unreasonable.

The report of the House Committee on Interstate and Foreign Commerce annexed to the Government's brief as Appendix-B also is in agreement with these views. We quote from this report (page 34 of the Government's revised brief):

> "The bill as reported proposes as to those articles classed as 'food products' under the terms of the pure-food law, that if they shall be in package form the quantity of the contents shall be plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count, provided, however, that reasonable variations shall be permitted. It is also provided that tolerances shall be established by the Secretary of Agriculture, Secretary of Commerce and Labor, and Secretary of the Treasury by rules and regulations

> in accordance with the general provisions of the pure-food act. Under the terms of the bill reasonable variations are permitted, whether tolerances are or are not established by the rules and regulations, nor will the tolerances established by the rules and regulations be conclusive upon the courts in determining the question of the reasonableness of the variations, but the establishment of tolerances by rules and regulations will undoubtedly be a great aid to the producers of food products in package form by letting them know in advance what the Government officials believe to be reasonable variations. The establishment of tolerances will also be a great aid to the officials both of the General Government and of the States in connection with the enforcement of the law."

It will be noted that a distinction is drawn between reasonable variations permitted by the Act and tolerances which may be established by the regulations. The ultimate determination as to the reasonableness of the variations in a given case is for the court. Tolerances established by the regulations are advisory merely, and are in the nature of directions to the executive officers as regards the standards to be observed by them in initiating prosecutions under the Act.

Assuming, however, that the Government may in this prosecution resort to the regulations as a guide, we would raise the question as to whether it has improved its position. The tolerances established by the regulations are set forth on pages 10 and 11 of the Government's revised brief. Apparently the sacks of cornmeal described in the indictment would be governed by clause (1) and clause (3). In clause (1) an exemption is granted where

error occurs in packing "conducted in compliance with good commercial practice." This involves an inquiry into what is the commercial practice in the field, and implies a distinction between "good" and "bad" practice. In clause (3) an exception is made for discrepancies due to differences in atmospheric conditions in various places, and which result from ordinary and customary exposure of the packages to evaporation or to the absorption of water. The Court may take notice that products such as cornmeal are peculiarly susceptible to variations of this character. The regulations provide that in such cases the reasonableness of the discrepancy "will be determined on the facts in each case." Accepting the regulations as applicable, the result is not to remove the obscurity, but rather to offer a choice of uncertainties. *Connally v. General Construction Company, 269 U. S. 385, 395.*

Finally, we would suggest that the Government in the Court below disclaimed any reliance upon the regulations[1], and this point was not passed upon by the District Court. We would also suggest that there is no assignment of error in the record directed to this point.

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(1) The following is taken from the Government's brief in the trial court: "Departmental regulations. The defendant in his brief argues at great length on the proposition that where a statute is lacking in necessary elements to define a crime, those elements may not be supplied by executive regulation. The Government is relying on no regulation as a basis for the charges brought in the information, nor does the defendant cite any regulation against which it aims its attack. The information is predicated on the provisions of the statute only, and it is respectfully submitted that they are sufficient."

On pages 20-23 of the Government's brief the argument is made that the 6th amendment has no application to this case because a prosecution of an offense under the Food and Drugs Act is not a criminal prosecution within the meaning of that amendment. It is said that a violation of the Food and Drugs Act is at most a petty offense, to the prosecution of which the limitations of the 6th amendment are inapplicable.

In this connection, we would point out that section two of the Act in terms characterizes the violations here complained of as a misdemeanor. At all times, a misdemeanor has been a crime. *United States v. Stevenson, 215 U. S. 190, 199.* The Court also remarked in the *Stevenson* case (page 199) that upon trial of the charge against the defendant he would be entitled to the constitutional protection which requires the Government to produce the witnesses against him. This is one of the rights guaranteed by the 6th amendment; and it would seem to follow that the defendant likewise would be entitled to the protection of the other rights secured by that amendment. The prosecution here is based upon an indictment containing nine counts, and the defendant is exposed to the possibility of the imposition of fines aggregating $1800.00. For subsequent offenses the statute provides that the penalty may be a fine of $300.00 or imprisonment not to exceed one year, or both, in the discretion of the Court.

We would further invite consideration of the Court to the proposition that if this prosecution is not a "criminal prosecution" within the meaning of the 6th amendment, it

would appear to follow as a matter of course that it is not a "criminal case" within the meaning of the Act of March 2, 1907, c. 2564, 34 Statutes 1246 *(U. S. C. Title 18, Sec. 682)*, upon which the jurisdiction of this court depends. If the argument of the Government should prevail, therefore, the result must be a determination that this appeal has been improvidently allowed, and should be dismissed.

This point is now raised by the Government for the first time. It is not made the subject of any assignment of error, nor was it passed upon by the trial court. As the Criminal Appeals Act contemplates vesting in this court jurisdiction only to review the particular question decided by the court below, the point is not now open to consideration by this Court. *United States v. Stevenson, 215 U. S. 194, 196.*

III.

The Act also is in conflict with Articles 1, 2 and 3 of the Constitution separating the Government into legislative, executive and judicial divisions, if its provisions in Section 3 authorizing the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce to make regulations are to be given the scope and effect now contended for by the Government. If Congress itself has failed to define a crime, it cannot empower the secretaries in the executive departments of the Government to do so. If the regulations be not relied upon, the Act is equally objectionable on this score in that it leaves the de-

termination of what shall constitute an offense to the court and jury in each case. *United States v. Reese, 92 U. S. 214; Cline v. Frink Dairy Company, 274 U. S. 445; United States v. United Verde Copper Company, 196 U. S. 205; Morrill, Collector, v. Jones, 106 U. S. 466; United States v. Eaton, 144 U. S. 677.*

Conclusion.

The judgment of the District Court is right and should be affirmed.

Respectfully submitted,

YANDELL BOATNER,
JUDSON M. GRIMMET,
Attorneys for Shreveport Grain and Elevator Company, Defendant and Appellee.

October, 1932.

SUPREME COURT OF THE UNITED STATES.

No. 19.—October Term, 1932.

The United States of America, Appellant, *vs.* Shreveport Grain & Elevator Company.	Appeal from the District Court of the United States for the Western District of Louisiana.

[November 7, 1932.]

Mr. Justice Sutherland delivered the opinion of the Court.

The defendant (appellee) was charged by indictment, returned in the court below, with misbranding certain sacks, containing corn meal, an article of food, by labeling each of the sacks as containing a greater quantity by weight than in fact was contained therein, contrary to the provisions of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768, U. S. C., Title 21, § 2, which make it unlawful to ship in interstate or foreign commerce any article of food or drugs which is adulterated or misbranded, within the meaning of the act. The penalty prescribed is a fine of $200 for the first offense, and for each subsequent offense, not exceeding $300, or imprisonment not exceeding one year, or both, in the discretion of the court. Section 8, as amended by the act of March 3, 1913, c. 117, 37 Stat. 732, provides that an article of food shall be deemed to be misbranded—

"Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act."

A motion to quash the indictment was interposed by the defendant upon the grounds that the act of Congress relied on is unconstitutional, because (1) the offense is not defined with certainty and therefore the act violates the due process clause of the Fifth Amendment, and the requirement of the Sixth Amendment

that the accused shall enjoy the right "to be informed of the nature and cause of the accusation"; and (2) it is in conflict with Articles I, II, and III of the federal Constitution which separate the government into legislative, executive and judicial branches.

The court below sustained the motion and dismissed the proceedings. The case comes here by appeal under the provisions of § 238 of the Judicial Code, as amended by the Act of February 13, 1925. U. S. C., Title 28, § 345; U. S. C., Title 18, § 682.

First. The contention seems to be that the proviso makes it necessary to read § 8 as substantively prohibiting unreasonable variations in the weight, measure or numerical count of the quantity and contents of any package from that marked on the outside of the package; and that the test thereby indicated is so indefinite and uncertain that it fails to fix any ascertainable standard of guilt, or afford a valid definition of a crime. In support of the contention *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, *United States* v. *Brewer*, 139 U. S. 278, *Connally* v. *General Const. Co.*, 269 U. S. 385, and other decisions of this Court are relied upon.

We are of opinion that the construction thus sought to be put upon the act cannot be sustained; and, therefore, other considerations aside, the cases cited do not apply. The substantive requirement is that the quantity of the contents shall be plainly and conspicuously marked in terms of weight, etc. We construe the proviso simply as giving administrative authority to the Secretaries of the Treasury, Agriculture, Commerce and Labor to make rules and regulations permitting reasonable variations from the hard and fast rule of the act and establishing tolerances and exemptions as to small packages, in accordance with § 3 thereof.* This construction avoids the doubt which otherwise might arise as to the constitutional point, and, therefore, is to be adopted if reasonably possible. *United States* v. *Standard Brewery*, 251 U. S. 210, 220; *United States* v. *La Franca*, 282 U. S. 568, 574. We find nothing in the terms of the act to require a division of the proviso so that the power of regulation will apply to the establishment of tolerances and exemptions, but not to reasonable variations. We think both are included. As to this there would be no room for doubt if it were not for the presence of a

*Sec. 3 provides that the Secretaries named "shall make uniform rules and regulations for carrying out the provisions of this act . . . ."

comma after the word "permitted," or the absence of one after the word "established." Inserting the latter, the proviso would read, "That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established, by rules and regulations . . ." Punctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation, or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed. *Hammock* v. *Loan and Trust Co.*, 105 U. S. 77, 84-85; *United States* v. *Lacher*, 134 U. S. 624, 628; *United States* v. *Oregon &c. Railroad*, 164 U. S. 526, 541; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 480; *Chicago, M. & St. P. Ry. Co.* v. *Voelker*, 129 Fed. 522, 526-527.

Our attention is called to the fact that the House Committee on Interstate and Foreign Commerce, in reporting the bill which afterwards became the act in question (H. R. 850, 62d Cong., 2d Sess., pp. 2-4), agreed with the view that the authority to make rules and regulations was confined to the establishment of tolerances and exemptions; and that the Senate Committee on Manufactures (S. R. 1216, 62d Cong., 3d Sess., pp. 2-4) reported to the same effect. In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 588-589; *Penna. R. R. Co* v. *International Coal Co.*, 230 U. S. 184, 199; *Van Camp & Sons* v. *Am. Can Co.*, 278 U. S. 245, 253. Like other extrinsic aids to construction their use is "to *solve*, but not to *create* an ambiguity." *Hamilton* v. *Rathbone*, 175 U. S. 414, 421. Or, as stated in *United States* v. *Hartwell*, 6 Wall. 385, 396, "If the language be clear it is conclusive. There can be no construction where there is nothing to construe." The same rule is recognized by the English courts. In *King* v. *Commissioners*, 5 A. & E. 804, 816, Lord Denman, applying the rule, said that the court was constrained to give the words of a private act then under consideration an effect which probably was "never contemplated by those who obtained the act, and very probably not intended by the legislature which enacted it. But our duty is to look to the language employed, and construe it in its natural and

obvious sense." See also *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 409; *Caminetti* v. *United States*, 242 U. S. 470, 485.

Moreover, the practical and long continued construction of the executive departments charged with the administration of the act and with the duty of making the rules and regulations therein provided for, has been in accordance with the view we have expressed as to the meaning of the section under consideration. The rules and regulations, as amended on May 11, 1914, deal with the entire subject in detail under the recital, "(i) The following tolerances *and variations* [italics supplied] from the quantity of the contents marked on the package shall be allowed: . . ." Then follows an enumeration of discrepancies due to errors in weighing which occur in packing conducted in compliance with good commercial practice; due to differences in capacity of bottles and similar containers, resulting from unavoidable difficulties in manufacture, etc.; or in weight due to atmospheric differences in various places, etc. These regulations, which cover variations as well as tolerances and exemptions, have been in force for a period of more than eighteen years, with the silent acquiescence of Congress. If the meaning of the statutory words was doubtful, so as to call for a resort to extrinsic aid in an effort to reach a proper construction of them, we should hesitate to accept the committee reports in preference to this contemporaneous and long continued practical construction of the act on the part of those charged with its administration. Such a construction, in cases of doubtful meaning, is accepted unless there are cogent and persuasive reasons for rejecting it. See, for example, *United States* v. *Johnson*, 124 U. S. 236, 253.

Second. The contention that the act contravenes the provisions of the Constitution with respect to the separation of the governmental powers is without merit. That the legislative power of Congress cannot be delegated is, of course, clear. But Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the "power to fill up the details" by prescribing administrative rules and regulations. That the authority conferred by the act now under review in this respect does not transcend the power of Congress is not open to reasonable dispute. The effect of the provision assailed is to define an offense, but with directions to those charged with the administration of the act to

make supplementary rules and regulations allowing reasonable variations, tolerances and exemptions, which, because of their variety and need of detailed statement, it was impracticable for Congress to prescribe. The effect of the proviso is evident and legitimate, namely, to prevent the embarrassment and hardship which might result from a too literal and minute enforcement of the act, without at the same time offending against its purposes. The proviso does not delegate legislative power, but confers administrative functions entirely valid within principles established by numerous decisions of this court, of which the following may be cited as examples. *Buttfield* v. *Stranahan*, 192 U. S. 470, 496; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 542; *United States* v. *Grimaud*, 220 U. S. 506, and authorities reviewed.

Judgment reversed.

Mr. Justice BRANDEIS, Mr. Justice STONE and Mr. Justice CARDOZO concur in the result on the ground that the statute, as punctuated, reads as its legislative history shows Congress intended it to read, and that, so read, it is sufficiently definite to satisfy constitutional requirements.

A true copy.

Test:

Clerk, Supreme Court, U. S.